SCSL-2004-14-AR73
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SPECIAL COURT FOR SIERRA LEONE
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THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice George Gelaga King
Justice Renate Winter
Justice Geoffrey Robertson
Justice Raja Fernando

Registrar: Robin Vincent

Date: 16 May 2005

PROSECUTOR **Against** **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-2004-14-AR73)

FOFANA – DECISION ON APPEAL AGAINST "DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE"

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SPECIAL COURT FOR SIERRA LEONE
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18 MAY 2005
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TIME: 11.38

THE APPEALS CHAMBER ("Appeals Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Justice Emmanuel Ayoola, Presiding Judge, Justice George Gelaga-King, Justice Renate Winter, Justice Geoffrey Robertson and Justice Raja Fernando;

BEING SEIZED OF the Notice of Appeal and Submissions against the Decision on Prosecution Motion for Judicial Notice and Admission of Evidence filed on 28 October 2004 on behalf of Moinina Fofana ("Appeal") pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules");

NOTING the Trial Chamber's Decision on Prosecution Motion for Judicial Notice of 2 June 2004 ("Trial Chamber Decision") granting the Prosecution Motion for Judicial Notice[1] in part, and the Corrigendum to that Decision of 23 June 2004;

NOTING the Trial Chamber's Decision on Joint Request for Leave to Appeal against Prosecution Motion for Judicial Notice ("Decision on Leave to Appeal") of 20 October 2004, in which it granted leave to appeal in respect of Fofana, but rejected Kondewa's application;

NOTING the Order of the President on 12 November 2004 assigning this matter to Justices Renate Winter, Geoffrey Robertson and himself, declaring that there would be no oral hearing on this matter and granting the Prosecution's belated Request of 8 November 2004 for one day's extension of time to file its Response and deeming the Response properly filed;

NOTING the Order of the President on 18 March 2005 assigning the matter to the full bench of the Appeals Chamber;

CONSIDERING the Prosecution's Response to the Appeal filed on 5 November 2004 ("Prosecution response") , which was one day outside the period stipulated by the "Practice Direction for Certain Appeals before the Appeals Chamber" of 30 September 2004;

CONSIDERING the Defence Reply to the Prosecution Response filed on 9 November 2004 ("Defence reply");

DECIDES AS FOLLOWS:

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[1] Prosecution's Motion for Judicial Notice and Admission of Evidence, filed on 1 April 2004 ("Prosecution Motion for Judicial Notice").

I. PROCEDURAL BACKGROUND

1. On 5 March 2004, in the case of the *Prosecutor v. Samuel Hinga Norman et al.*, the Prosecution filed a Request for the Defence to admit/refuse/deny/dispute certain statements contained in that request.[2] On 15, 17 and 18 March 2004, the Defence for Fofana, Kondewa and Norman respectively, indicated their unwillingness to accede to the Prosecution Request unless the Prosecution satisfied its full disclosure obligations. The Prosecution then filed an application[3] on 1 April 2004, pursuant to Rules 73, 89 and 92bis, requesting the Trial Chamber to take Judicial Notice of certain factual statements and documents ("Motion for Judicial Notice").

2. On 19 April 2004, the Defence for Norman filed a response to the Motion for Judicial Notice and on 26 April 2004, the Prosecution filed its Reply thereto. On 23 April 2004, Counsel for the third Accused (Kondewa) filed a motion requesting an extension of time within which to respond to the Prosecution Motion for Judicial Notice.[4] This Motion was dismissed in a Decision by the Trial Chamber on 30 April 2004 pursuant to Rule 7(C) of the Rules. Despite the Trial Chamber's dismissal of Kondewa's motion for an extension of time, the Kondewa Defence, on 4 May 2004, filed an objection to the Prosecution Motion for Judicial Notice which was rejected by the Trial Chamber on 6 May 2004[5].

3. At the Pre-Trial Conference of 28 April 2004, Defence Counsel for Fofana stated orally that it accepted some propositions of the Prosecution as facts of common knowledge and it wished this statement to be considered as the response to the Motion[6]. The Fofana Defence, however, failed to submit a written response to the Prosecution Motion.

4. The Trial Chamber in its Decision on the Prosecution Motion found as follows:
   a) That alleged facts (A), (B), (D), (E), and (W) qualify for judicial notice.[7]

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[2] "Prosecutor's Request to Admit".
[3] "Prosecution's Motion for Judicial Notice and Admission of Evidence".
[4] "Defence Motion Requesting an Extension of time within which to respond to Prosecution Motion."
[5] "Kondewa - Order rejecting the filing of the Defence Objection to Prosecution Motion for Judicial Notice and Admission of Facts".
[6]. These are Facts B, P, and W in Annex A to the Prosecution Motion for Judicial Notice.
[7] See Annex I to the Trial Chamber Decision on Judicial Notice for the relevant factual statements.

b) That alleged facts (H), (K), (L), (M), and (U) qualify for judicial notice in a judicially modified form.

c) That all other facts of common knowledge listed in Annex A of the Motion do not qualify for judicial notice because they are not beyond reasonable dispute.

d) That the facts found to qualify as judicial notice satisfy the tests for them to be judicially noticed.

e) That documents 9 -21 and 31 - 32 in Annex B of the Motion qualify for judicial notice as to their existence and authenticity;

f) That documents 22 - 30[8] and 34 - 40 qualify for judicial notice as to their existence, authenticity and contents.

g) That the rest of the documents in Annex B were not found to qualify for judicial notice because their existence and authenticity or their existence, authenticity and contents are not beyond reasonable dispute.

h) That the documents judicially noticed were deemed by the Chamber to be conclusively proven as to their existence and authenticity.

II. SUBMISSIONS OF THE PARTIES

A. Defence Submissions

5. The Defence grounds of appeal can be summarised as follows:

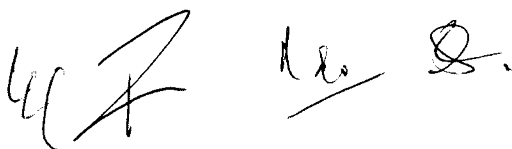
   a) That the Trial Chamber wrongly applied the legal criteria for determining facts of common knowledge.

   b) That the Trial Chamber failed to take into consideration the oral response to the Prosecution Motion for Judicial Notice on behalf of Fofana on 28 April 2004.

6. The Defence disagrees that facts A, D, H, K, L, M and U in Annex I to the Decision on Judicial Notice are facts of common knowledge because they do not fulfil the criteria for determining facts of common knowledge set out by the Trial Chamber which are:

   a) the facts are relevant to the case of the accused person;
   b) the facts are not subject to reasonable dispute;

[8] See Annex II to the Trial Chamber Decision on Judicial Notice for the relevant Security Council resolutions.



c) the facts do not include legal findings; and
d) the facts do not attest to the criminal responsibility of the accused.

7. Disputing in particular fact "L", which states that Fofana was the National Director of War of the CDF, the Defence submits that if this fact is judicially noticed, it would make it impossible to disprove, being a central question in the trial, and that any answer to the question whether the Accused can be held responsible as a superior or co-perpetrator in a joint criminal enterprise for crimes committed by the CDF members would directly reflect his position in the group.

8. The Defence argues further that:

   a) Facts A, D and H include legal findings or characterisations and therefore cannot be considered as facts of common knowledge.
   b) The expression "armed conflict" is a necessary condition for criminal responsibility under Article 4(C) of the Statute and fact "A" which states that an armed conflict occurred in Sierra Leone from March 1991 until January 2002, includes legal findings of which no judicial notice can be taken.
   c) The Trial Chambers at the International Criminal Tribunals for the former Yugoslavia and Rwanda (respectively "ICTY" and "ICTR") do not take judicial notice of facts which are elements of the crimes charged, unless such facts have already been adduced in prior proceedings before the Tribunal.
   d) The Security Council Resolutions referred to in Annex II of the Decision on Judicial Notice include facts that are subject to reasonable dispute as well as legal findings or characterisations and, moreover, Security Council Resolutions reflect political compromise.

9. The Defence seeks an annulment by the Appeals Chamber of the Decision of the Trial Chamber and suggests that the Appeals Chamber could take judicial notice of facts B, P, and W as specified in Annex I of the Decision and of the existence and authenticity of the UN Security Council Resolutions as contained in Annex II of the decision.

B. Prosecution Response

10. The Prosecution submits that:

a) The Defence fails to support its arguments with any legal authority or sound application of the criteria established in the Decision.

b) The Defence does not substantiate its claim that the facts listed under A, D, H, L, M and U of Annex I to the Decision are contestable or disputable.

c) Fact D is not subject to dispute since it arises out of the provisions of the Geneva Conventions (Article3 (1) of Convention IV, and Protocol II Additional to the Geneva Conventions.

d) Fact "L" does not attest to the criminal responsibility of Fofana, and taking judicial notice of this fact does not relieve the Prosecution of the task of proving that the accused, in his capacity as National Director of war, was also responsible for the crimes as alleged.

e) The Trial Chamber properly took judicial notice of the contents of the Security Council Resolutions, and in the case of *Semanza*, the Trial Chamber of the ICTR took judicial notice not only of the existence and authenticity of the pertaining Security Council Resolutions but also their contents.

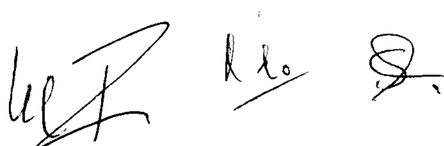
f) International Criminal Tribunals do take judicial notice of facts contained in authoritative documents such as those of the UN and its affiliated bodies, and the facts listed under A, H, K and U meet the requirements as stated in the *Semanza* case.

g) The term "armed conflict" in facts A and H and "organised armed faction" in fact D are mere facts of common knowledge which qualify for judicial notice and are not legal findings or characterizations.

h) None of the facts listed under A, D, H, K, L, M and U of Annex I to the Decision are reasonably disputable, applying the *Semanza* test.

C. Defence Reply

11. In its Reply the Defence reiterates some of its earlier arguments and submits that:



a) The Prosecution Response was filed out of time.[9]

b) Items A, D and H amount to legal findings which directly concern the criminal responsibility of the accused, and, contrary to what the Prosecution says, the terms "armed conflict" and "organised armed faction" are not mere factual elements.

c) Items K, L and M are not only contentious, they also make no limitation as to the time the alleged positions were held.

d) Item U is a fact subject to reasonable dispute since the Prosecution is unable to state with certainty when the alleged event took place and it includes legal findings or attests to the criminal responsibility of the Accused.

e) 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 the involvement of particular persons in such events.

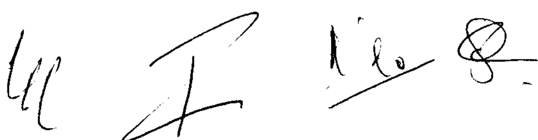
12. Disputing the Prosecution's claim that the Defence claims were unsubstantiated, the Defence refers to paragraphs 15 -22 of its submissions on appeal where it claims to have methodically applied the criteria adopted by the Trial Chamber, and accepted by both Prosecution and Defence, to each disputed item. The Defence argues further that the Prosecution's reliance solely on the *Semanza* case does not serve to disprove the Defence submissions.

13. The Defence reiterates its contention that facts A, D, H, K, L and U in Annex I to the Decision are not facts of common knowledge under Rule 94 of the Rules and that "armed conflict" is a necessary pre-condition for criminal responsibility under Article 4(c) of the Statute, and so cannot be judicially noticed.

14. With regard to Security Council resolutions, the Defence submits that taking judicial notice of them is at odds with the inherent power of the Court as an independent finder of fact.

III. PRELIMINARY ISSUE

[9] This point has been disposed of by the Order of President Ayoola of 12 November 2004 deeming the Response to have been properly filed.



15. Before addressing the main issue at stake in the present appeal, the Appeals Chamber notes that the Trial Chamber failed to take account of the oral response given by Fofana to the Prosecution Motion for Judicial Notice. The Trial Chamber found in its Decision on Leave to Appeal that "it may not have given proper consideration to the oral Response of the Second Accused".[10] In its oral response, the Defence accepted facts B, P and W as facts of common knowledge and indicated that it might be able to agree to E, Q, F, G, L, U, if the wording were amended somewhat after discussions with the Prosecution. In its response to the Joint Request of the Second and Third Accused for Leave to Appeal against Decision on Prosecutor's motion for Judicial Notice, the Prosecution argued that taking into consideration the oral response of the second Accused at the Pre-trial conference would not have affected the outcome of the Decision, so that the decision could stand.[11] As an Oral Response has to be accepted the same way as a written one, it is the view of the Appeals Chamber that the oral response of the Defence was valid and directly relevant to the issue at stake and that the Trial Chamber erred in not taking it into account. However, the Appeals Chamber has now taken it fully into account, so the granting of leave did repair any miscarriage of justice. We note that the Trial Chamber could simply have reconsidered its decision and taken the oral submissions into account, rather than using its own failure as a reason to give leave to appeal.

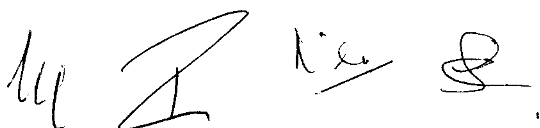
IV. APPLICABLE LAW

16. The general rules of evidence that this Court must apply are contained in Rule 89 of the Rules, which provides that:

> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

[10] Decision on Leave to Appeal, para. 20.

[11] Prosecution Response, 16 June 2004, at para 7.



(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

17. Rule 94 of the Rules provides as follows:

Judicial Notice

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

(B) At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings.

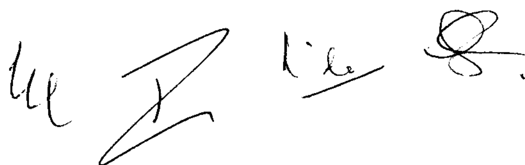
18. Rule 94 permits judicial notice of three categories of fact:

a) facts of common knowledge (94(A));
b) adjudicated facts from other proceedings before the Court (94(B)); and
c) documentary evidence from other proceedings before the Court (94(B))

19. At this stage in the life of the Court, no adjudicated fact from other proceedings before this Court or documentary documents from other proceedings before this Court exist, the Appeals Chamber therefore limits its considerations to Rule 94(A).

20. In order to establish the meaning of "facts of common knowledge", the Trial Chamber relied on the ICTR decision in *Semanza,* which dealt extensively with facts of common knowledge following a Prosecution request that the Trial Chamber take judicial notice of:

> "a panoply of facts, which collectively may fairly be characterized as socio-political historical background facts relating to the existence of 'genocide', 'armed conflict', and



'widespread and systematic attacks' against the Tutsi civilian population in Rwanda during the months of April through July, 1994."[12]

21. In the *Semanza* Decision, relied upon by both Prosecution and Defence in this Appeal, 'facts of common knowledge' were interpreted to mean "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 law of nature".[13] The Trial Chamber also held that common knowledge encompassed "those facts that are generally known within a tribunal's territorial jurisdiction".[14] Therefore, "[u]nder the rubric of 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 sources that evidence of their existence is unnecessary."[15]

22. The doctrine of judicial notice has been said to serve two main purposes:[16]
    a) to expedite the trial by dispensing with the need to submit formal proof on issues that are patently indisputable; and
    b) to foster consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair.

23. It was stated in *Semanza* 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."[17]

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[12] *Prosecutor v Semanza*, Case No. 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, para. 4 ("*Semanza* Decision").
[13] *Semanza* Decision, para. 23.
[14] *Semanza* Decision.
[15] *Semanza* Decision, para. 25.
[16] *Semanza* Decision, para. 20.
[17] *Semanza* Decision, para. 46.

It has also been stated by an ICTY Trial Chamber that: "The purpose of judicial notice under Rule 94 is judicial economy...and...a balance should be struck between judicial economy and the right of the accused to a fair trial".[18]

24. The Charter of the International Military Tribunal at Nuremberg as well contained a provision on judicial notice in Article 21 which reads as follows:

> Article 21: 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.

25. Judicial notice under Rule 94 must be distinguished from the court's reception of information under Rule 92*bis*, which the prosecution relies upon as an alternative mode of proof. Rule 92*bis*(A) and (B) provide:

> **Alternative Proof of Facts**
>
> (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
>
> (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
>
> [...]

26. SCSL Rule 92*bis* is different to the equivalent Rule in the ICTY and ICTR and deliberately so. The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92*bis* in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities.[19] The effect of the SCSL Rule is to permit the reception of

[18] *Prosecutor v Simic et al.*, Case No IT-95-9-PT, 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, p. 3.

[19] The amendment was adopted on 7 March 2003.

"information" - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation". This phraseology was chosen to make clear that proof of reliability is not a condition of admission: all that is required is that the information should be *capable* of corroboration in due course. It is for the trial chamber to decide whether the information comes in a form, or is of a kind, that is "susceptible to confirmation". It follows, of course, from the fact that its reliability is "susceptible of confirmation", that it is also susceptible of being disproved, or so seriously called into question that the court will place no reliance upon it.

27. Rule 92*bis* permits facts that are not beyond dispute to be presented to the court in a written or visual form that will require evaluation in due course. A party which fails in an application to have a fact judicially noticed under Rule 94(A) may nonetheless be able to introduce into evidence the sources upon which it has relied under 92*bis* and at the end of the trial the court may well conclude that the fact has been proved beyond reasonable doubt. The weight and reliability of such "information" admitted via Rule 92*bis* will have to be assessed in light of all the evidence in the case.

V. MERITS OF THE MOTION

28. Whereas the Defence as well as the Prosecution agree that the Trial Chamber used the correct legal criteria in determining of which facts it would take judicial notice as facts of common knowledge, the central claim of the Defence consists in stating that the Trial Chamber erred in the application and interpretation of these criteria. It is accepted though that the Trial Chamber correctly identified the criteria for facts of common knowledge as follows:

    a) the facts are relevant to the case of 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.

    Before turning to the interpretation of the criteria, it is of assistance to set out the facts that are in dispute.

29. The seven facts as found by the Trial Chamber that the Defence disputes are as follows:

A The armed conflict in Sierra Leone occurred from March 1991 until January 2002.

D The Accused and all members of the organized armed factions engaged in fighting within Sierra Leone were required to comply with International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions.

H Groups commonly referred to as the RUF, AFRC and CDF were involved in armed conflict in Sierra Leone.

K The Accused, SAMUEL HINGA NORMAN, was the National Coordinator of the CDF.

L The Accused Moinina Fofana was the National Director of War of the CDF.

M The Accused, Allieu Kondewa was the High Priest of the CDF.

U In or about November and/or December 1997, the CDF, including Kamajors, launched an operation called "Black December".

Furthermore, the Defence argues that the Trial Chamber erred in taking judicial notice of the contents of certain Security Council Resolutions.

30. It is helpful at this point to examine the legal implications of judicial notice. The ICTR Trial Chamber in *Semanza* stated that judicially noticed facts serve as conclusive proof of those facts and the taking of judicial notice "ends the evidentiary inquiry." The Chamber went on to say that:

> 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

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dispensing with formal proofs for matters that are of common knowledge and are reasonably indisputable.[20]

As a result, the Chamber held that it did not need to determine the question of whether it would accept presumptions of the same facts, which had been pleaded as an alternative by the Prosecution in that case.

31. The Appeals Chamber notes that ICTY trial chambers have taken two approaches. The first is that once a fact has been judicially noticed this ends the evidentiary inquiry and the fact is taken as conclusively proven. The second is that taking judicial notice of a fact means that the moving party does not have to present formal proof of that fact at trial, and shifts the burden of proof to the opposing party to disprove the fact. The 'burden shifting approach' has been adopted specifically in relation to Rule 94(B) as opposed to Rule 94(A). Indeed, it does not seem to be compatible with the concept that facts capable of being judicially noticed are beyond reasonable dispute. If the possibility of a reasonable dispute exists then the fact should not be judicially noticed. In the *Krajisnik* decision, the Trial Chamber stated that judicial notice of "*facts of common knowledge*" under Rule 94(A) normally implies that such facts *cannot* be challenged during trial.[21]

32. This Chamber comes to the conclusion that facts of common knowledge under Rule 94(A) cannot be challenged during trial and that legal conclusions as well as facts which constitute legal findings cannot be judicially noticed.

33. This Chamber will now consider the application and interpretation of the criteria to each of the facts that were judicially noticed by the Trial Chamber.

(i) The armed conflict in Sierra Leone occurred from March 1991 until January 2002 and Groups commonly referred to as the RUF, AFRC and CDF were involved in the armed conflict in Sierra Leone (Facts A and H)

34. The Defence alleges that the fact that there was an armed conflict in Sierra Leone is both subject to reasonable dispute and amounts to a legal finding that directly concerns the criminal responsibility of the Accused as it is an element of the crimes under Articles 3

[20] *Semanza* para 41.
[21] *Krajisnik* Decision, para. 16.

and 4(c) of the Statute with which the Accused is charged. The basis of the Defence objection is neither to the time period nor to the reference to the involvement of the RUF, AFRC and CDF in the armed conflict, but to the assertion that an armed conflict existed at all during the period relevant to the indictment.

35. The existence of an armed conflict is an important factual or contextual element in all war crimes by definition. This is reflected in the wording of Articles 3 and 4 of the Statute, as it is in the equivalent provisions in the Statutes of the ICTY and ICTR. In the *Simic* case, the Trial Chamber found that Rule 94 was intended to cover facts and not legal consequences inferred from them so that the trial chamber could take only judicial notice of factual findings and not of a legal characterisation as such.[22]

36. The relevant test therefore comes back first to the question of whether these facts are beyond reasonable dispute and can be described as facts of common knowledge. According to principle, this requires an examination of whether the fact is generally known within the territorial jurisdiction of this Court or whether it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question.[23] A judge may rely on his own local knowledge, which is the case here, especially, as the SCSL is located in Sierra Leone.[24] The fact that there was an armed conflict in Sierra Leone is a 'notorious fact of history'. Furthermore, in the context of Sierra Leone these facts cannot be subject to *reasonable* dispute taking into consideration the general knowledge of the population. A multitude of victims with mutilations which cannot stem from anything other than an armed conflict allows for an accurate and ready determination of this fact by immediately obtainable evidence. To contest the fact that there was an armed conflict is frivolous. The armed conflict even provided the context in which the Special Court was created to try those who bear the greatest responsibility for crimes committed.

37. Furthermore, the fact that an armed conflict existed is capable of accurate and ready determination by a wide range of other authoritative sources, as for example, the

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[22] *Prosecutor v Simic*, Case No. IT-95-9-PT, Decision on 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, p. 5.

[23] *Semanza* Decisión, Para 24

[24] *Mullen v Hackney Borough Council*, [1997] 2 All ER 906

existence of the United Nations peacekeeping mission established by Security Council resolution.

38. In addition, the appellant in this case has already approached this Chamber on a previous occasion, arguing that there was an international armed conflict in Sierra Leone, thus acknowledging the existence of an armed conflict as such and challenging the jurisdiction of the Court to proceed.[25] Finally, the very existence of the Lomé Peace Accord also confirms that an armed conflict existed, as has been recognised by this Chamber.[26]

39. This Chamber now turns to the question of whether the factual finding that an armed conflict existed amounts to a legal finding. Even if the existence of an armed conflict is a general prerequisite or precondition for the crimes under Articles 3 and 4 of the Statute, acknowledging that such a conflict exists does not of itself draw any legal conclusion regarding the individual criminal responsibility of the Accused, not even of him taking part in that conflict. In the case of *Simic*, conclusions about the nature of the armed conflict (a prerequisite for the competence of the court) were not judicially noticed. The fact that an armed conflict had occurred was judicially noticed.

40. However, as the Facts A and H do not contain such assertions, (and the Trial Chamber took care to modify Fact H from the original form submitted by the Prosecution to avoid this risk) this Chamber finds no error in the Trial Chamber judicially noticing Facts A and H.

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[25] *Prosecutor v. Fofana*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction - Nature of the Armed Conflict, 25 May 2004. The existence of an armed conflict was acknowledged in that Motion.

[26] On various occasions this Chamber has acknowledged that an armed conflict occurred in Sierra Leone, without making any factual or legal finding as to the nature of that conflict. See e.g *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), A. Ch., 31 May 2004 at para 22; *Prosecutor v Kallon* SCSL 2004-15 and *Prosecutor v Kamara* SCSL-2004-16, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber,13 March 2004,. At para 41 this Chamber found that "the parties to the conflict are the lawful authority of the State and the RUF". In para 42 reference is made to the Lomé Agreement bringing to an end an internal armed conflict. In paragraph 48, while the Chamber notes that "a degree of organisation of the insurgents may be a factor in determining whether the factual situation of internal armed conflict existed", it declines to determine that point as it was not the basis of the appeal. In his separate opinion to the Decision on Lack of Jurisdiction / Abuse of Process: Amnesty provided by the Lomé Accord, *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(E), A. Ch., 25 May 2004, Justice Robertson also noted that "It is unnecessary to make any findings as to the facts of the internecine conflict which raged in Sierra Leone between 1991 and 2001, alleged to involve a number of armed factions which fought in various combinations against the government and its supportive militias": para 5.

(ii) The Accused and all members of the organized armed factions engaged in fighting within Sierra Leone were required to comply with International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions (Fact D)

41. In regard to fact D, it is clear that the statement is a proposition. It is not even a proposition of fact but of law. That international humanitarian law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949 and Additional Protocol II to the Geneva Conventions exist is a fact. That organized armed factions were engaged in fighting within Sierra Leone is a statement of fact as well. However, whether they were required to comply with International Humanitarian Law and the laws and custom governing the conduct of armed conflicts is a matter of legal conclusion to be drawn on application of law to the facts which would include the factual situation of armed conflict that had been rightly judicially noticed. The Trial Chamber was in error in taking judicial notice of fact D.

(iii) The three accused each held particular positions within the CDF (Facts K, L and M)

42. According to the Defence, the offices alleged to have been held by the Accused suggest positions of authority, which will be relevant to the establishment of superior criminal responsibility and individual responsibility as a co-perpetrator in a joint criminal enterprise. Although the Defence focuses on Fact L, which relates to Moinina Fofana who is the appellant in this case, Facts K and M relate to the other two co-accused who are jointly charged in the consolidated indictment. In particular, the Defence objects to the lack of specificity in the relevant period in which any such positions were held, and submits that factual findings on this point must be determined at trial on evidence that is subject to dispute.

43. Each of the Accused is charged with superior criminal responsibility under Article 6(3) of the Statute. The elements required to establish this responsibility include an assessment of whether an accused is in a position of superiority with effective command and control over subordinates, and knew or had reason to know of their acts, thus establishing the

chain of command. Evidence regarding the specific position held by an accused during the relevant period is likely to be relevant to each of these elements and the Prosecution should be expected to prove this at trial, especially since the Second Accused does dispute it. As a result, the Appeals Chamber finds that the Trial Chamber erred in taking judicial notice of Facts K, L and M.

(iv) In or about November and/or December 1997, the CDF, including Kamajors, launched an operation called "Black December" (Fact U).

44. This fact was judicially noticed by the Trial Chamber in a modified form from that originally sought by the Prosecution, which included the additional words at the end of the sentence "intended to block off the movements of people and food on the highways so as to starve the junta of supplies and support in towns under their control". In seeking judicial notice of this fact the Prosecution referred the Trial Chamber to five documents in support, listed on page 9 of Annex A to its Motion. The first document referred to is one paragraph of the Third Report of the Secretary-General on the Situation in Sierra Leone 5 February 1998.[27] This paragraph makes no reference to any operation called "Black December". The relevant lines refer to the findings of a UN technical survey team that visited Sierra Leone between 10 and 17 January 1998 as follows:

> Intensified guerrilla-style actions against the junta forces were being conducted by an organization called the Civil Defence Unit (CDU). CDU, which apparently comprises the Kamajors and similar groupings of traditional village-based hunters in the north and centre of the country, claims to control all major roads in Sierra Leone.

45. It should be noted that this is the only one of the five documents the existence and authenticity of which was judicially noticed by the Trial Chamber. Nevertheless, this finding did not extend to the contents of the document; the question of the document itself is considered in the following section. The remaining four documents included apparent statements of the CDF or Kamajors and a report produced by the organisation No Peace Without Justice. Although the Trial Chamber correctly declined to judicially notice the second part of Fact U as proposed by the Prosecution, it erred in judicially

[27] S/1998/103, paragraph 10.

noticing Fact U at all. Whether any operation called "Black December" was conducted by the CDF and during what time period cannot be said to be a notorious historical fact nor can it be readily verified. This Chamber finds that it is not a fact of common knowledge and would appear to be a disputable fact that needs to be proved at trial.

46. The source information to support facts D, K, L, M and U, however, may be submitted by the Prosecution as evidence under Rule 92*bis*, subject to the assessment of their relevance and reliability by the Trial Chamber.

(v) **Judicial Notice of the contents of Security Council Resolutions**

47. Finally, the Defence submits that judicial notice cannot be taken of the *contents* of the various Security Council resolutions listed in paragraphs 22-30 of Annex II to the Trial Chamber Decision because these resolutions contain both legal findings and are subject to more than reasonable dispute. The Defence argues that the political nature of the Security Council means that the contents of its resolutions are the result of political compromise but is not disputing the authenticity of those documents (in other words, the reliability of the documentary source) for the purposes of judicial notice.

48. The Trial Chamber states in relation to the documents of which it took judicial notice in Annex II of its Decision, that they "are also deemed conclusively proven as to their existence and authenticity"[28], notwithstanding the fact that Annex II includes some documents of which judicial notice was also taken of their contents. The Chamber's finding on conclusiveness goes on to state that it concludes the evidentiary inquiry and they "cannot be challenged at the trial of the Accused herein predicated upon our prior finding that they are beyond reasonable dispute".[29] It seems that the Trial Chamber made a distinction in the implications of judicial notice between documents and the facts that documents assert: In the case of documents the contents of which were judicially noticed, only the existence and authenticity are conclusive evidence that is not subject to subsequent challenge. The Trial Chamber appears to be inferring that the *contents* of the judicially noticed documents in part (II) of Annex II are still subject to challenge at trial through the admission of evidence in the normal way pursuant to Rule

[28] Trial Chamber Decision, para. 33.
[29] Trial Chamber Decision, para 34.

89(C) of the Rules. The Trial Chamber does not appear to have applied the test for facts of common knowledge to the contents of the nine Security Council Resolutions between 1997 and 2001 that are disputed by the Defence, which on its face is an appealable error, were it not be seen in the above mentioned context of the possibility of challenge during trial.

49. Whether or not the source of a document is a political body, and more particularly whether that body was party to the establishment of the Special Court, is of no relevance. There is no legal reason for any difference in applying the same test to all documents. It must be up to the Trial Chamber to determine whether the content satisfies the test of "beyond reasonable dispute". It therefore might be possible that some factual assertions in a UN Security Council Resolution can be judicially noticed and others cannot. The question of whether a fact stated in a Security Council resolution is to be judicially noticed will ultimately depend on whether it is capable of reasonable dispute. It follows that there is no point in judicially noticing the contents of a document as such. Facts asserted within Security Council Resolutions, Secretary General Reports and other reports by reputable organizations may be the subject of judicial notice. However, this cannot be achieved by noticing the contents of the whole resolution or report, which may contain hundreds of factual assertions, mostly irrelevant. The proper procedure would be to extract from the resolutions or reports the factual propositions which a party wants the Court to notice. It will then be for the Trial Chamber, after considering any defence material, to decide whether the extracted proposition really is incontrovertible.

FOR THE FOREGOING REASONS,

THE APPEALS CHAMBER

PARTIALLY ALLOWS the Appeal,

DECIDES that alleged facts (D), (K), (L), (M) and (U) do not qualify for judicial notice,

DECIDES that the Security Council Resolutions annexed to the Prosecution Motion for Judicial Notice do qualify for judicial notice, once the facts contained therein are

extrapolated from each of the Resolutions and recognised as incapable of reasonable dispute,

DISMISSES the Appeal in all other aspects.

Justice Ayoola and Justice Robertson each append a Separate Opinion concurring with this Decision.

Done in Freetown this sixteenth day of May 2005.

Justice Emmanuel Ayoola
Presiding

Justice George Gelaga King

Justice Renate Winter

Justice Geoffrey Robertson

Justice Raja Fernando

[Seal of the Special Court for Sierra Leone]

SEPARATE OPINION OF JUSTICE ROBERTSON

1. The procedural background to this appeal is set out in the initial paragraphs of the judgements of the Court and of Ayoola J. It concerns the application of the test for judicial notice to statements in documents and in the UN resolutions, and invites comment upon both the procedures adopted below for the taking of judicial notice and upon the consequences of such notice, once taken. Since this chamber is differing from the Trial Chamber in a number of respects, I set out my own reasons for so doing.

2. The Trial Chamber, in granting leave, noted the high threshold set for interlocutory appeals by the conjunctive test of "exceptional circumstances" and "irreparable prejudice" laid down by Rule 73(B). In relation to Mr Fofana, the second accused, one circumstance that it found exceptional was its own "opinion that it may not have given proper consideration to the oral response of the second accused" to the Prosecution Motion which defence counsel had made at a status conference.[1] Its misgivings in this respect are well founded: oral statements made by properly instructed counsel are entitled to the same force as those made in written submissions, although if they constitute admissions it is obviously advisable, to avoid misunderstandings, that they should subsequently be reduced to writing. But where an oversight of this kind occurs, it is always open to a Trial Chamber, in the exercise of its inherent power to avoid injustice, to reconsider its decision, rather than to regard the oversight as an "exceptional circumstance" justifying an appeal. An error recognised as such by the Trial Chamber itself should be corrected in the course of the trial, rather than put right by the expensive and time-consuming process of appeal to this Chamber. However, this appeal chamber has had the benefit of full submissions from the defence, and there cannot now be any question of a miscarriage of justce.

[1] Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice, 19 October 2004, para 20

III. APPLICABLE LAW

3.Unusually, the law involved in this Appeal, namely the interpretation of the judicial notice provision in Rule 94(A), has not been the subject of any disagreement between the parties: they all accept the analysis of the case law on judicial notice provided by the Trial Chamber in its Decision[2], to the effect that the criteria for taking judicial notice of a relevant fact is that it is not open to reasonable dispute. The Trial Chamber in this respect followed the ICTR *Semanza* decision.[3] This appeal has turned upon the Trial Chamber's application of this test, which resulted in judicially noticing, under Rule 94(A), a number of factual propositions and an array of UN resolutions and reports and other quasi-official documents. For reasons which I shall explain, judicial notice in respect of these reports, rather than any facts extrapolated from them, was misconceived. Further, certain of the Prosecution's factual propositions should not have been judicially noticed, either because they were propositions of law or because they were not beyond reasonable dispute.

4.It is necessary to explain the distinction between judicial notice and alternative modes of receiving evidence and argument, notably:

i. Rule 92*bis*, which permits the admission of relevant and reliable information;

ii. The practice of acting upon admissions made by the parties for the purpose of the proceedings;

iii. Propositions of law.

[2] Trial Chamber Decision, paras 15-30

[3] *Prosecutor v Semanza*, Case No. 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, para. 4 ("*Semanza* Decision").

5. Judicial notice is an important means of receiving evidence, especially in international courts[4], but it must be carefully distinguished from these other procedures, because facts that are judicially noticed are thenceforth taken for granted and cannot be the subject of further evidence or dispute in the trial. This appeal concerns judicial notice of "facts of common knowledge" under Rule 94(A): it does not relate to the special form of judicial notice permitted by Rule 94(B), namely of facts adjudicated, or documents accepted, in other proceedings in the Special Court.

6. Provision for judicial notice is found in the law of evidence applied in most national courts. International criminal courts invariably adopt a formulation that originated in Article 21 of the Charter of the International Military Tribunal at Nuremberg. In our rules, Rule 94(A) provides:

> "A chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."

This mirrors the first sentence of Article 21, which went on additionally to permit the reception, by way of exception to what was then regarded in Anglo-American jurisprudence as a rigid rule against hearsay, of a range of official documents and records:

> "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 government documents and reports of the United Nations, including the Acts and documents of the committees set up in various allied countries for the investigation of war crimes, and of records and findings of military or other tribunals of the United Nations."

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[4] The ICTY, for example, has notably liberalised its approach towards written evidence. See Steven Kay, "The Move from Oral Evidence to Written Evidence", *Journal of International Criminal Justice* 2 (2004) 495. This may in part be in response to the UN working party, which recommended that greater use be made of the doctrine in the ICTR. See:

The second sentence of Article 21 has not been reproduced in the Special Court Rules. It is unnecessary, because our proceedings are not constrained by the hearsay rule: recurrent and reliable factual statements in documents are admissible under Rule 92*bis*. It is illuminating, nonetheless, to note the recognition (at a time when the rule against hearsay was rigid in national courts) that prosecution of war crimes would require a much broader evidential canvas and that the introduction of relevant background information should not be constrained by artificial rules developed in context of trial by jury.

7. Decided cases make clear that facts "judicially noticed" – that is, accepted by the court as true facts incapable of contradiction in the proceedings – are facts which may not be known to all or even a majority of the public but are facts that are simply beyond any reasonable dispute.[5] They will include, of course, "notorious" facts that all reasonable people accept without enquiry in their daily lives, so that evidence would simply be a waste of time.[6] More often, they will be facts which have been propounded in official records or reports or authoritative documents or books of history or geography or science and which cannot be seriously disputed. The theoretical basis of the procedure by which courts take judicial notice of facts in this latter category has been the subject of some academic controversy in common law countries: should they treat authoritative sources as pieces of documentary evidence received by way of exception to the hearsay rule, or do they look at such sources simply in order to equip themselves to take judicial notice? Since this court is not shackled by the rule against hearsay, the latter description is to be preferred. The party which puts on the motion seeking judicial notice of a particular fact must direct the court's attention to the range of authoritative sources which taken together demonstrate that the fact is indisputable.

[5] *Semanza* decision, *ibid*, para 23, and cases there cited.

[6] Examples are given in *Cross on Evidence*, 7th Australian Edition, edited by Heydon, (2004) p144-5.

8. Judicial notice involves the acceptance by the court of a factual proposition, the indisputability of which is usually deduced from the multiplicity of reliable sources in which the proposition is asserted, and from the absence of any source which provides a contrary indication. These sources, however authoritative, do not themselves have to be "judicially noticed". A party which asks the court to take judicial notice of a fact will normally append to its motion copies of the written records or sources upon which it relies. The court, after considering any argument or material submitted by the opposite party, will take judicial notice if it decides that the fact is true, in the sense that it is not reasonably capable of dispute. That fact will thereafter be deemed incontrovertible in the proceedings. The only exception – and it will rarely if ever arise – is if fresh information subsequently comes into the hands of a party or to the notice of the court suggesting that the fact is questionable after all. Were such a situation ever to arise, the chamber should exercise its inherent power to reconsider its original decision.

9. It follows that facts judicially noticed are for all intents and purposes invincible: no evidence in rebuttal is admissible. If it were, the doctrine would serve little purpose. It has sometimes been suggested that judicial notice merely shifts the burden of proof or creates a "well found presumption" of truth, but logically this cannot be the case, certainly with facts noticed judicially under Rule 94(A).[7] Facts judicially noticed must be given their full evidential weight and may be used by any party as a basis for submissions or inferences or arguments.

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[7] See for example, *Prosecutor v Krajisnik*, Case No. IT-00-39&40, Decision on Prosecution's Motion for Judicial Notice of Adjudicated facts and Admission of Written Statements of Witnesses Pursuant to Rule 92bis, 28 February 2003, para. 15 ("*Krajisnik* Decision"); *Prosecutor v Milosevic*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003; *Semanza Decision*. The *Krajisnik* decision accepts that facts judicially noticed cannot be challenged during the trial, as does the *Semanza* decision. To the extent that *Milosevic* suggests otherwise it should not be followed, although it would appear that both Judge Shabbudeen and Judge Hunt, for different reasons, thought that facts noticed under 94(A) were conclusive. As *Cross on Evidence*, 7th Edition (Heydon ed), p166 and footnote 183) puts it "In spite of occasional remarks suggesting that taking judicial notice is merely the equivalent of *prima facie* proof of a fact, it appears that rebutting evidence is inadmissible".

IV. JUDICIAL NOTICE DISTINGUISHED FROM:

a. Propositions of Law

10. Judicial notice is confined, however, to facts, which become part of the evidence in the case. It does not include propositions of law. This distinction is sometimes difficult to draw: certain facts appropriate for judicial notice, such as the ratification of a treaty, will have legal consequences. In this case, the Trial Chamber fell into error by treating a proposition of law (that the Geneva Conventions bound the factions fighting in Sierra Leone) as a fact of which it could take judicial notice. Such propositions, however irrefutable, are not facts in evidence: they are legal principles available for the court to apply to the facts in evidence in order to produce conclusions necessary for the determination of guilt or innocence. As an ICTR Trial Chamber said in the *Butare* decision: "facts involving interpretation of legal characterisations of facts are not capable of admission under Rule 94."[8] A Trial Chamber may of course draw legal conclusions from judicially noticed facts, but such conclusions will be capable of contest through the appeal process.

b. Admissions

11. Facts judicially noticed must be distinguished from facts that are admitted by the parties for the purpose of the proceedings. Both categories of fact are binding on the court and available as facts deemed true for the determination of the case. But in separate proceedings, facts which have been judicially noticed will be treated as "adjudicated" for the purposes of Rule 94(B), whereas those that have simply been agreed by the parties will lack this quality. For present purposes, I simply note that it will often be possible for a party to agree a fact which is likely to be true and

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[8] *Prosecutor v Nyiramasuhuko et al*, ICTR-97-21-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, Trial Chamber, 15 May 2002 (*Butare* Decision), para 39.

which they have no evidence or information to controvert, but which lack that high degree of likelihood that puts them beyond reasonable dispute. Every counsel for every party appearing in this Special Court has a duty to assist it: this obligation entails a duty to make admissions, if requested and at an early stage, of facts that they have no reason to dispute later in the trial. This is an ethical duty binding professionally on all counsel who appear in this court: it is reflected in the Code of Conduct recently adopted,[9] but exists from the moment that Counsel accepts instructions. This duty particularly applies to the Prosecution, which should readily concede facts which it apprehends the defence could only prove with expense and difficulty. The presumption of innocence, as this Chamber pointed out in its decision in *Fofana*[10], means no more but no less than that the prosecution must prove beyond reasonable doubt the elements of the offence: it does not relieve defence counsel of their duty to make admissions, if requested, of matters which cannot or will not be disputed.

c. <u>"Information" admissible alternatively under Rule 92*bis*</u>

12. Judicial notice under Rule 94 must be distinguished from the court's reception of information under Rule 92*bis* – the Rule which the prosecution relies upon as an alternative mode of presentation. The court has a general power under Rule 89(C) to admit *any* relevant evidence and Rule 92*bis* provides:

Alternative Proof Of Facts

A. A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony;

B. The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.

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[9] The obligation to the Court is found in Article 8 of the Code of Conduct.

[10] *Prosecutor v Fofana*, Case No SCSL-2004-14, Appeal Against Decision Refusing Bail, 11 March 2005, para 37.

13. Our Rule 92*bis* is different to the equivalent Rule in the ICTY and ICTR and deliberately so. The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92*bis* in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities.[11] The effect of our Rule is to permit the reception of "information" - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation". This phraseology was chosen to make clear that proof of reliability is not a condition of admission: all that is required is that the information should be *capable* of corroboration in due course. It is for the trial chamber to decide whether the information comes in a form, or is of a kind, that is "susceptible to confirmation": propaganda claims or political attacks in partisan newspapers might be excluded, for example, but information set out in UN or NGO or Truth Commission reports, or in books by serious historians, should be admitted. So might certain newspaper reports, if they carry a reporter's by-line and purport to be based on eye-witness reports or interviews or have other indicia of reliability. It follows, of course, from the fact that their reliability is "susceptible of confirmation" that it is also susceptible of being disproved, or so seriously called into question that the court will place no reliance upon it.

14. Rule 92*bis* permits facts that are not beyond dispute to be presented to the court in a written or visual form that will require evaluation in due course. A party which fails in an application to have a fact judicially noticed under 94A will nonetheless be able to introduce into evidence under Rule 92*bis* many of the sources upon which it has relied at the end of the trial the court may well conclude that the fact has been proved beyond reasonable doubt. The weight and reliability of such

[11] The amendment was adopted on 7 March 2003.

"information" admitted via Rule 92*bis* will have to be assessed in light of all the evidence in the case. This is a familiar judicial exercise and experienced Trial Chamber judges know how they should conduct it, alert as always to the dangers of malice and media "demonisation" of defendants and the risks of fabrication or exaggeration in reports from unidentified sources. Such risks might be reduced if the court has oral evidence from the reporter or compiler/ editor of the report or details about the care with which it has been compiled. There cannot, however, be automatic acceptance of unsourced factual statements, even if promulgated by a respected organisation. In this context I note, in order to reject, the suggestion (based on a passage in *Semanza*) that a court established by the UN is bound to take judicial notice of factual averments made in the resolutions of that body.[12] Such assertions, even when emanating from the Security Council, do not enter this forum with an indelible imprimatur of truth. They will, of course, normally be regarded as reliable and readily susceptible of confirmation: indeed, in the absence of information to the contrary a Trial Chamber may well decide to take judicial notice of a factual assertion made in a Security Council resolution. However, if there is any real reason to doubt the assertion, it will have to be introduced into evidence via Rule 92*bis* and not noticed as an incontrovertible fact of common knowledge under Rule 94(A).

V. THE PURPOSE OF JUDICIAL NOTICE

15. The purpose of judicial notice in the law of evidence is often said to be expedition, from which it has been assumed that the court, in deciding whether to apply Rule 94(A), must reach what is described as "the balance between judicial economy and the right of the accused to a fair trial".[13] In my view, expedition and judicial

[12] *Semanza* Decision, para 38.

[13] For example, the ICTY Trial Chamber has stated 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":

economy do not accurately reflect the real purpose of this Rule and the "balance" sets up a false dichotomy between the assumed purpose of economy and the rights of the defendant. Expedition and economy may be the *result* of judicial notice, but the purpose of the Rule is rather to promote a fair trial for all parties both by relieving them of the burden of proving facts that have been convincingly established elsewhere and by enabling the tribunal to take into account in its decision the full panoply of relevant facts currently available in the world. Judicial notice equips courts to make just decisions and enables them to avoid the rebuke and ridicule that would be heaped upon them were they to turn a blind eye to history or science or to embark upon fatuous and unnecessary enquiries. Judicial notice is not, most emphatically, a prosecution tool that must be "balanced" or "weighed" against countervailing rights to a fair trial: it is a procedure that can and should also be used by defendants to simplify a task which might otherwise be beyond their resources.[14] They benefit, as much as the Prosecution and the Court, from any expedition that results. Facts that can be judicially noticed *must* be judicially noticed – Rule 94(A) is mandatory.

16. The doctrine of judicial notice does not and cannot relieve the Prosecution of proving the elements of the offence. The defendant, by pleading "not guilty", puts in issue his *mens rea* or guilty mind which cannot in consequence be the subject of judicial notice. He also puts in issue the *actus reus*, i.e. that description of offending conduct to which the court must be satisfied that his actions amount. Judicial

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Prosecutor v Simic, Case No. IT-95-9-PT, Decision on 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 at para 17; see also *Semanza* Decision, para 37; see also *Prosecutor v Mejakic*, Case No IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004.

[14] An example of creative defence use of judicial notice is given by Steven Kay (above, note 4) at p497. Nokes, *The Limits of Judicial Notice*, p74 (1958) LQR 59 at 66-7 suggests that the judge who "provokes lay ribaldry" by asking "Who are the Beatles?" is merely indicating that the name is not the proper subject of judicial notice. But no legal doctrine should be allowed to bring courts or judges into disrepute: "household" names, e.g. of popstars at the height of their fame, should be judicially noticed as a matter of common knowledge.

notice may be taken of facts which are relevant to characterise his actions, but those actions themselves must be proved by evidence. In practice, any fact which is within the knowledge of the defendant, but which he denies, cannot be made the subject of judicial notice: his denial must be accepted by the court as indicative that the alleged fact is reasonably disputable if only because the defendant himself disputes it and intends to do so on oath or affirmation or to call witnesses to dispute it.

VI. THE MERITS

17. The facts and matters which the Trial Chamber decided judicially to notice in this case are helpfully annexed to its Decision. Annex 1 relates to certain statements of fact, which I comment upon in turn, adopting the alphabetical numbering used in the Court below:

A. The armed conflict in Sierra Leone occurred from March 1991 until January 2002.

18. That a prolonged armed conflict took place in Sierra Leone is a truly "notorious" matter of historical record and indeed is obvious to anyone living in or visiting this country, and to all the judges of this court.[15] It is incapable of reasonable (or any) dispute and should not have been disputed by the defence. They did not question the dates, but evinced concern that a finding of "armed conflict" might be a legal characterisation. It is not: it is a straightforward description of a state of affairs that existed in this country over the relevant time. Judicially noticed facts may well have legal consequences, but that does not prevent them from being judicially noticed.

B. The city of Freetown, the Western area and the following districts are located in the country of Sierra Leone: Kenema, Bow, Bonthe, Moyamba.

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[15] Who may use the evidence of their own eyes, and rely upon local knowledge: *Mullen v Hackney Borough Council* etc

19. These are straightforward geographical facts that cannot sensibly be disputed. They were not disputed and the Trial Chamber was bound to take judicial notice of them.

D. The accused and all members of the organised armed factions engaged in fighting within Sierra Leone were required to comply with International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12th August 1949 and additional protocol II to the Geneva Conventions.

20. Judicial notice of this "fact" was impermissible, for two reasons. First, it assumes that the accused were engaged in fighting – a matter that they dispute and which the prosecution must therefore prove. Secondly, shorn of any reference to the accused, what remains is plainly a proposition of law rather than a statement of fact. It appears to be a correct proposition – certainly the defence indicated that it would not be disputed (although some commentators have questioned the extent to which Additional Protocol II has become part of international humanitarian law). Legal propositions must only be presented through legal argument: if accepted, they will be applied to the facts that are found by the court.

E. Sierra Leone acceded to the Geneva Conventions of 12th August 1949 and additional protocol II to the Geneva Conventions on 21st October 1986.

21. This is an indisputable official fact which can readily be verified by reference to authoritative sources. Although it carries legal consequences, it nonetheless remains a relevant fact of which judicial notice must be taken.

H Groups commonly referred to as the RUF, AFRC and CDF were involved in armed conflict in Sierra Leone.

22. Whether or not the defence was prepared to agree, there can be no reasonable dispute, a) that armed conflict occurred in Sierra Leone, b) that groups were

involved in that conflict, and c) every reliable source refers to groups identified as the RUF, the AFRC and the CDF. Judicial notice of this fact was appropriately taken.

K **The accused, Samuel Hinga Norman, was the national coordinator of the CDF.**

L **The accused Moinina Fofana was the national director of war of the CDF.**

M **The accused Allieu Kondewa was the high priest of the CDF.**

23. The Prosecution showed the Court some material (reports from NGOs, and in Norman's case from the UN Secretary -General)[16] which described the defendants as occupying these positions. Through their counsel, they denied the correctness of the identification. The positions were not public offices which are filled through a process which can be officially verified, for example, by an electoral declaration or a gazettal, and it follows from the defendants' denials that these facts cannot be made the subject of judicial notice. In the absence of any agreement as to the defendants' true positions in the CDF, if any, the prosecution will be entitled to introduce its source information under Rule 92*bis*.

U. **In or about November and/ or December 1997, the CDF, including Kamajors, launched an operation called "Black December".**

24. This is a fact capable of being judicially noticed, irrespective of defence objection, but I doubt whether the five sources relied upon by the Prosecution really put it beyond reasonable dispute.[17] Moreover, I fail to see where this so-called "fact" gets the prosecution, unless it includes (as it did in the original prosecution request) some description of the operation. A military action described as "Operation No Living Thing" may speak for itself, but "Black December" is equivocal in the

[16] See Prosecution Motion, 1 April 2004, Annex A, p5
[17] *Ibid*, p9.

absence of explanatory detail. For these reasons, the Trial Chamber erred in making it the subject of judicial notice.

W. The Junta was forced from power on or about 14th February 1998. President Kabbah's government returned in March 1998.

25. The prosecution relies not merely upon UN and NGO Reports, but upon a CDF statement and a Kamajor Press Release. If the Trial Chamber is satisfied that these are authentic, then the preconditions for 94(A) would appear to be satisfied. These matters were properly made the subject of judicial notice, although the phrase "forced from power" lacks clarity.

ANNEX II: 13 reports of the UN Secretary General on the situation in Sierra Leone and two UNICEF reports accusing the AFRC and the CDF of recruiting child soldiers. These reports are judicially noticed "as to their Existence and Authenticity".

26. These lengthy documents contain many factual assertions. Those which relate to the UN and its peacekeepers obviously carry a high degree of reliability, but other statements "reporting" aspects of the conflict may be based on unreliable – certainly unattributable – sources. The UNICEF accusations come in a form that is not *ipso facto* reliable but is nonetheless information "susceptible to confirmation". However, none of these reports was admitted under 92*bis*: all were judicially noticed "as to their existence and authenticity" but not as to their contents or any factual assertion made in their pages.

27. This, with due respect, appears to be an exercise without obvious point. Of course these reports exist and are authentic, but that gets the prosecution nowhere unless they wish to put the reports in evidence, e.g. to explore the defendant's reaction to them at the time they were published – and for that purpose, they can use Rule 92*bis*. The only basis for judicially noticing them is that a particular fact stated in

them, and identified clearly, has been established beyond peradventure. There are various facts which would seem at first blush to be so reliably stated in these documents as to be beyond dispute and no doubt those facts could be supported from other sources. If there is no basis for disputing them, then the facts themselves, set out clearly as a proposition, should be judicially noticed. But this is a precise exercise which cannot possibly be accomplished by purporting to notice an entire report for its authenticity alone. It is up to the prosecution to extrapolate the particular fact or facts which it claims are beyond dispute, and to marshal corroborative material. It should not deluge the court with reports many pages in length which state hundreds of facts, and ask merely for judicial notice to be taken of the report's "existence".

UN SECURITY COUNCIL RESOLUTIONS. Nine were judicially noticed "as to their Existence, Authenticity and Contents"

28. Even Security Council resolutions do not come with an iron-clad guarantee of the truth of the facts stated in them. They come, however, with a high degree of credibility, and in the absence of any information to the contrary the court might well be justified in judicially noticing such facts. However, it is unacceptable for the court simply to adopt an entire resolution, invariably a mixture of posited facts, propositions of law, and opinions of the Secretary General or the powers that be in the Security Council. It is necessary for the prosecution to extrapolate from these wide-ranging resolutions such specific facts as it wishes the court to notice under 94(A), and present it to the court together with corroboratory material. It will be for the Trial Chamber then to decide whether the particular fact stated in the resolution is incontrovertible.

Maps, Peace Agreements, Treaties

29. These are all properly admissible in the absence of any dispute. The UNAMSIL map is an authoritative document, and the various ceasefire agreements and peace accords are matters of record and indeed of history. The ICRC list of states that are party to the Geneva Conventions and their additional protocols is authoritative. There was no need to take judicial notice of the Geneva Conventions themselves, which have become part of international law.

General Comment

30. The Prosecution's initial motion for judicial notice and admission of evidence was filed on 1 April 2004. Insofar as it seeks the notice of factual statements A through to Y, it properly sets out the multiple sources for each statement. However, when it comes to appendix II material it simply requests "an authenticity finding and admission of the following documents" and lists no less than 69 documents ranging from political speeches by Johnny Paul Koroma and President Kabbah to lengthy reports by Amnesty International, Human Rights Watch and No Peace Without Justice, together with press releases, UN humanitarian situation reports, Secretary-General reports and Security Council resolutions. This mass of undigested paperwork should not be imposed upon the Trial Chamber and the defence in such an undisciplined fashion. It is apt to swamp the proceedings in detail, much of it irrelevant, and to increase costs massively as counsel will be entitled to charge for reading all this material, much of it extraneous. The court's task of finding relevant facts is not assisted by approaching a judicial notice motion in this fashion. This is the problem with permitting judicial notice of lengthy documents *per se* – a practice that some other international courts appear to have allowed.[18] It must not become a practice in this court. Any party, whether

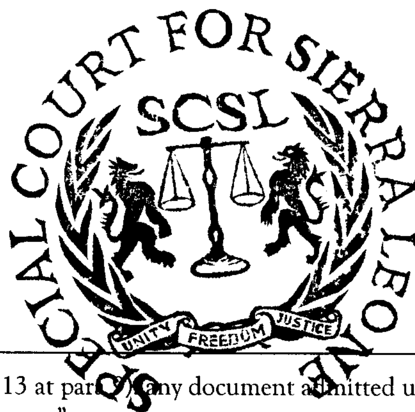
[18] ICTY and ICTR precedents on this point should not be followed, if in fact they are true precedents: the cases where reports have been admitted under 94(A) "for existence and authenticity" may reflect the survival in those courts of the rule against hearsay and their lack of SCSL 92*bis*. The more appropriate appeal

prosecution or defence, that seeks to introduce a lengthy document must indicate in the margin the passages they claim to be relevant and indeed, if judicial notice under Rule 94(A) is sought, they must identify and set out as a proposition the fact which they want judicially noticed and direct the court's attention to the assertion of that fact in any document that they present in pursuance of their application.

31. The judges of this court have taken a conscious decision to produce rules that avoid wherever possible lengthy legal argument over admissibility. All relevant material is admissible, but that is not an invitation to parties to deluge the court with thousands of pages of NGO and UN reports. The wider admissibility provisions in the SCSL carry a concomitant duty on the parties to narrow the documentary material they seek to introduce and to identify only those passages which are of direct relevance to the case, however interesting or insightful other aspects of the report may be.

CONCLUSION

32. The Trial Chamber erred in taking judicial notice of facts D, K, L, M and U. The evidential material submitted by the prosecution in respect of that notice is, however, admissible under Rule 92*bis*. The contents of Security Council resolutions may in principle be the subject of judicial notice, once such propositions are extrapolated from the Resolution and recognised as incapable of reasonable disputation.



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approach is that of *Simic* (above note 13 at par. 9): any document admitted under 94(A) must be "a readily accessible source of indispensable accuracy".

JUSTICE AYOOLA'S SEPARATE OPINION

1. I am in agreement with the Judgement of this Court. In view of the importance of the general issues that have arisen I append this Concurring Opinion to highlight a few individual perspectives.

I. PROCEDURAL BACKGROUND

2. On 5 March 2004, in the case of the *Prosecutor v. Samuel Hinga Norman et al.*, the Prosecution filed a Request[1] for the Defence to admit/refuse/deny/dispute certain statements contained in that request. On 15, 17 and 18 March 2004, Defence for Fofana, Kondewa and Norman respectively, indicated their unwillingness to accede to the Prosecution Request unless the Prosecution satisfied its full disclosure obligations. The Prosecution then filed an application[2] on 1 April 2004, pursuant to Rules 73, 89 and 92*bis*, requesting the Trial Chamber to take Judicial Notice of certain factual statements and documents ("Motion for Judicial Notice").

3. On 19 April 2004, Defence for Norman filed a response to the Motion for Judicial Notice and on 26 April 2004, the Prosecution filed its Reply thereto. On 23 April 2004, Counsel for the third Accused (Kondewa) filed a motion[3] requesting an extension of time within which to respond to the Prosecution Motion for Judicial Notice. This Motion was dismissed in a Decision by the Trial Chamber on 30 April 2004 pursuant to Rule 7(C) of the Rules. Despite the Trial Chamber's dismissal of Kondewa's motion for an extension of time, the Kondewa Defence, on 4 May 2004, filed an objection to the Prosecution Motion for Judicial Notice which was rejected by the Trial Chamber on 6 May 2004[4].

[1] "Prosecution's Request to Admit"
[2] "Prosecution's Motion for Judicial Notice and Admission of Evidence"
[3] "Defence Motion Requesting an Extension of Time within which to respond to Prosecution Motion"
[4] "Kondewa – Order rejecting the filing of the Defence Objection to Prosecution Motion for Judicial Notice and Admission of Facts"

4. At the Pre-Trial Conference of 28 April 2004, Defence Counsel for Fofana stated orally that it accepted some propositions of the Prosecution as facts of common knowledge and it wished this statement to be considered as the response to the Motion[5]. The Fofana Defence, however, failed to submit a written response to the Prosecution Motion.

5. The Trial Chamber in its Decision on the Prosecution Motion found as follows:
   (a) That alleged facts (A), (B), (D), (E) and (W) qualify for judicial notice.[6]
   (b) That alleged facts (H), (K), (L), (M), and (U) qualify for judicial notice in a judicially modified form.
   (c) That all other facts of common knowledge listed in Annex A do not qualify for judicial notice because they are not beyond reasonable dispute.
   (d) That the facts found to qualify as judicial notice satisfy the tests for them to be judicially noticed.
   (e) That documents 9 - 21 and 31 - 32 in Annex B of the Decision qualify for judicial notice as to their existence and authenticity.
   (f) That documents 22 - 30[7] and 34 - 40 qualify for judicial notice as to their existence, authenticity and contents.
   (g) That the rest of the documents in Annex B were not found to qualify for judicial notice because their existence and authenticity or their existence, authenticity and contents are not beyond reasonable dispute.
   (h) That the documents judicially noticed were deemed by the Chamber to be conclusively proven as to their existence and authenticity.

II. THE APPEAL

6. From the decision the Accused Fofana, pursuant to leave granted by the Trial Chamber, has appealed on two grounds, the substance of which are:

[5] These are facts B, P, and W in Annex A to the Prosecution Motion for Judicial Notice.
[6] See Annex 1 to the Trial Chamber Decision on Judicial Notice for the relevant factual details
[7] See Annex II to the Trial Chamber Decision on Judicial Notice for the relevant resolutions of the Security Council.

(a) That although the Trial Chamber correctly stated the legal criteria for determining facts of common knowledge it erred in applying those criteria in determining the facts it took judicial notice of.

(b) That the Trial Chamber failed to take into consideration the oral response to the Prosecution Motion for Judicial Notice on behalf of Fofana on 28 April 2004 whereby the Accused Fofana accepted only some propositions of the Prosecutions as fact of common knowledge and had stated that none of the documents were accepted except from their existence and authenticity.

7. The Defence by its Notice of Appeal sought an annulment of the Decision of the Trial Chamber. It also sought that the Appeals Chamber take judicial notice of facts B, P, and W as specified in Annex 1 of the Decision and judicial notice of the existence and authenticity of the resolutions of the Security Council as contained in Annex II of the decision.

8. The issues on this appeal are (i) whether facts A and D, without modification, and facts H, K, L, M and U in their modified form, all listed in Annex 1 to the decision of the Trial Chamber rightly qualify for judicial notice; (ii) whether the Trial Chamber was correct when it held that the resolutions of the Security Council specified in the decision qualified for judicial notice as to contents and (iii) whether the decision of the Trial Chamber should be annulled by reason of its failing to make proper consideration of the oral response of the accused Fofana.

III. SUBMISSIONS OF THE PARTIES

A. Defence Submissions

9. The Fofana Defence argues that all the facts which the Trial Chamber took judicial notice of, namely facts A, D, H, K, L, M and U in Annex I to the Decision on Judicial Notice are facts of common knowledge because they do not fulfill the criteria for determining facts of common knowledge set out by the Trial Chamber as follows: (a) the facts are relevant to the case of 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.

10. It was submitted, generally, that the facts were subject to more than reasonable dispute and in particular, that:

    (a) Facts A, D, and H include legal findings or characterizations and therefore cannot be considered as facts of common knowledge.
    (b) The expression "armed conflict" is a necessary condition for criminal responsibility under Article 4(C) of the statute and fact "A" which states that an armed conflict occurred in Sierra Leone from March 1991 until January 2002, includes legal findings of which no judicial notice can be taken.

11. The Fofana Defence argued that the Trial Chambers at the International Criminal Tribunals for the former Yugoslavia and Rwanda (respectively "ICTY" and "ICTR") do not take judicial notice of facts which are elements of the crimes charged, unless such facts have already been adduced in prior proceedings before the Tribunal. It was submitted that fact L is one such fact as judicial notice of the fact that the accused Fofana was the National Director of War of the Civil Defence Forces ("CDF") would make it impossible for him to disprove that fact which, it was argued, is a central question in the trial in regard to the question whether or not he can be held responsible, by virtue of his position in the group, as a superior or co-perpetrator in a joint criminal enterprise for crimes allegedly committed by the CDF.

12. In regard to the resolutions of the Security Council referred to in Annex II of the Decision it was submitted they include facts that are subject to reasonable dispute as well as legal findings or characterizations and, that the contents of the resolutions of the Security Council reflect political compromise and therefore the statements of facts contained therein are not neutral and are subject to reasonable dispute.

B. Prosecution Response

13. The Prosecution prefaced its submissions with the general submission that the Fofana Defence fails to support its arguments with any legal authority or sound application of the criteria established in the Decision. It went on to submit first, that the Fofana Defence did not substantiate its claim that the facts listed under A, D, H, L, M and U of Annex I to the decision are contestable or disputable; secondly, that fact D is not subject to dispute since it arises out of the provisions of the Geneva Conventions and Protocol II additional to the Geneva Conventions;[8] thirdly, that fact "L" does not attest to the criminal responsibility of Fofana, and taking judicial notice of this fact does not relieve the Prosecution of the task of proving that the accused, in his capacity at National Director of War, was also responsible for the crimes as alleged; fourthly, that the Trial Chamber properly took judicial notice of the contents of the Security Council Resolutions; fifthly, that international criminal tribunals do take judicial notice of facts contained in authoritative documents such as those of the United Nations and its affiliated bodies; sixthly, the facts taken judicial notice of meet the test as stated in the *Semanza* case[9]; seventhly, that the term "armed conflict" in facts A and H and "organized armed faction" in fact D are mere facts of common knowledge which qualify for judicial notice and are not legal findings or characterizations.

14. The Prosecution referred, in support of its submissions, to the *Semanza* decision, in which the Trial Chamber of the ICTR took judicial notice, not only of the existence and authenticity of pertinent resolutions of the Security Council but also of their contents and finally submitted that none of the facts listed under A, D, H, K, L, M and U of Annex I to the Decision are reasonably disputable, applying the *Semanza* test.

[8] The Geneva Conventions of 12 August 1949 and the Second Additional Protocol of 8 June 1977.
[9] *Prosecutor v Semanza*, Case No. 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 ("*Semanza* Decision").

C. Fofana Defence Reply

15. In its Reply the Fofana Defence reiterates some of its earlier arguments and submits that the Prosecution Response was filed out of time. It went further to make submissions in further elaboration of its earlier submissions in the following terms: Items A, D, and H amount to legal findings which directly concern the criminal responsibility of the accused, and, contrary to what the Prosecution says, the terms "armed conflict" and "organized armed faction" are not mere factual elements; items K, L, and M are not only contentious, they also make no limitation as to the time the alleged positions were held; item U is a fact subject to reasonable dispute since the Prosecution is unable to state with certainty when the alleged event took place and it includes legal findings or attests to the criminal responsibility of the Accused, and 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 the involvement of particular persons in such events.

16. With regard to resolutions of the Security Council, the Fofana Defence submits that taking judicial notice of them is at odds with the inherent power of the court as an independent finder of fact.

IV. APPLICABLE LAW

17. Rule 89 of the Rules provides that:

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

18. Rule 94 of the Rules provides as follows:

Judicial Notice

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

(B) At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings.

V. MERITS OF THE MOTION

The Doctrine of Judicial Notice: General Principles.

19. The Trial Chamber with sufficient clarity set out and discussed the core principles of the doctrine of judicial notice in the international criminal law system, describing the doctrine as one of 'law's oldest doctrine'. So, indeed it is.[10] The Charter of the International Military Tribunal at Nuremberg ("the Nuremberg Charter") provided that the tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.[11] The Nuremberg Charter specifically provided for judicial notice of "official governmental documents and reports of the United Nations" etc, whereas no such specific reference is made to such materials in Rules of several of the modern international criminal tribunals. Without undue speculation as to the reason for absence of such specific reference, it can be reasoned that judicial notice of such materials can still be taken on the strength of provisions such as Rule 89 (B) of our Rules.[12] That the doctrine of judicial notice in all its ramification is now part of the international criminal justice system is indisputable.[13]

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[10] Judicial notice of matters of fact has been familiar to English lawyers for over 650 years: G. D. Nokes "The Limits of Judicial Notice" (1958) 74 *LQR* 59, 61

[11] Article 21 of the Nuremberg Charter which provided:

> 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.

[12] Rule 89(B) provides:

20. The Fofana defence and the Prosecution have both referred at the Trial Chamber and before this Chamber to the *Semanza* case in which the Trial Chamber of the ICTR considered to a considerable extent the doctrine of judicial notice.[14] In that decision the ICTR noted the two policy reasons for the doctrine, usually recited by legal scholars as: expedition of trial by dispensing with the need to submit to proof facts that are patently indisputable and the value of fostering consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair. These views are useful in understanding the rational basis of the doctrine of judicial notice. However, they do not count as factors in determining the test applicable in identifying facts that qualify for judicial notice on the basis of 'common knowledge' nor, indeed, the limits of judicial notice. Notwithstanding, these factors may be useful to bear in mind in the exercise of discretion in cases where the facts for which judicial notice is requested fall in the borderline of judicially noticeable facts but judicial economy and uniformity tilts the balance in favour of noticing such facts, provided the fairness of the trial will not thereby be impaired. It is emphasized that facts apart, perhaps from adjudicated facts, are not judicially noticed merely by reason of need for judicial economy and consistency even though those ends are achieved by the application of the doctrine of judicial notice.

21. The foundations of judicial notice as set out in Rule 94 of the Rules are: common knowledge *[Rule 94(A)]*; adjudication of facts from other proceedings before the Court *[Rule 94(B)]*; and documentary evidence from other proceedings before the Court *[Rule 94(B)]*. In this appeal this Chamber is concerned only with the first of those.

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

[13] The Rules of Evidence and Procedure of the ICTY and ICTR, and now of the ICC, contain judicial notice provisions as in Rule 94(A) of our Rules.

[14] See *Semanza* decision, paras 19 28

Determining Common Knowledge

22. What then are facts of common knowledge? It is generally accepted that they are '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.'[15] That definition describes the nature of the 'facts' but not 'common knowledge', the appreciation of which is at the heart of the problem. It has been said that:[16]

> Judicial notice of matters of fact is founded upon that fund of knowledge and experience *which is common to both judges and jurors*, and is not confined to the Bench. [Italics supplied.]

Two broad approaches to determining 'common knowledge' can be attempted. The first is 'common knowledge' described by the source of such knowledge. The second is 'common knowledge' described by characteristics that make knowledge 'uncommon'.

(i) Knowledge through the experience of mankind.

23. Knowledge through the common experience of mankind or which had been acquired imperceptibly by mankind or by a great majority of a particular community, though not universal, is common knowledge. Generally known geographical facts, the laws of nature and historical facts will fall in this category. Communication and reasoning will be tedious and almost impossible if they do not proceed on the footing of such pool of knowledge. There is an abundance of matters and facts which are silently noticed without controversy in the course of judicial proceedings and which in some legal systems would have been removed from the category of facts capable of being pleaded. Knowledge not obviously proceeding from the common experience of mankind and not proceeding from common fund of knowledge and experience of

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[15] See Bassiouni & Manikas, *The Law of the International Tribunal for the Former Yugoslavia.* P.952 quoted in paragraph 23 of *Semanza* decision.

[16] Nokes, "Limits of Judicial Notice" 74 (1958) *LQR* 59, p66.

mankind form a different category of 'common knowledge'. It is in regard to this category of 'common knowledge' that Nokes had this to say:[17]

> But when a fact less obviously forms part of mankind's fund of common knowledge, it may be necessary for counsel to request the judge to take judicial notice; and in such cases the judge must exercise discretion whether to do so, which is merely another way of saying that he must decide whether the fact falls within the rule as being notorious.

24. It is not difficult to accept as valid, and adopt the statement by Nokes, that three considerations which appear to affect the determination of whether a fact is notorious or not are:[18]

> First, a common knowledge differs with time and place; so a fact which was notorious a century ago may no longer be the appropriate subject of notice, and a fact commonly known in one locality may be unknown in another. Secondly, a fact may be common knowledge only among a class of the community, such as those intended in a particular sport; and the judge who provides lay ribaldry by inquiring 'Who is So-and-so? may be merely indicating that the name of a popular footballer is not the proper subject of notice. Thirdly, though a judge may consider a fact to be appropriate subject of notice, he may not himself remember or profess to know it, and therefore he may take steps to acquire the necessary knowledge.

25. The last consideration leaves room for a further sub-division of judicial notice into judicial notice without enquiry and judicial notice after enquiry or acquired notice. In the English case of *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* it was stated that:[19]

> Judicial notice refers to facts, which a judge can be called upon, either from his general knowledge of them, or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer.

26. In Blackstone's Criminal Practice it was stated:[20]

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[17] *Ibid*, p. 66
[18] Nokes: Op. Cit pp. 66 -67
[19] [1932] AC 191 at p. 212
[20] Blackstone's Criminal Practice [1991] para. F1.3

> The justification for judicial notice after enquiry, is that some facts, although not sufficiently notorious are demonstrable by reference to *sources of virtually indisputable authority*, or arise so frequently that proof in the normal way is undesirable because of the cost and the need for uniformity of decision. [emphasis added.]

Authoritativeness of the source and the generality of the nature of the information are some of the factors that account for the validity of acquired knowledge as source of judicial notice. However, acquired knowledge of specialized information will best be derived from evidential source and utilized as evidence than as foundation for judicial notice.

(ii) 'Uncommon Knowledge'

27. Uncommon knowledge' is identified by factors which negate 'common knowledge'.

28. *The first is reasonable disputability.* A fact cannot be said to be of 'common knowledge' if it is *reasonably* disputable or rebuttable. The court will not take judicial notice of a fact that is not final in the sense that it is subject to rebuttal. Where a fact is disputable or capable of rebuttal there would be as numerous probable versions as there are diverse probable versions as to make it impossible to fix a single one with notoriety or an attribute of commonality. It may be observed, albeit in passing, that the Trial Chamber seemed to have favoured a two-level enquiry in which the factor of common knowledge must be inquired into first, before an inquiry into the reasonable indisputability of the fact. Fidelity to the express provisions of Rule 94(A) which provides that 'A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof' does not seem to permit any further enquiry after a finding that a fact is of common knowledge. The essence of judicial notice is that the court is acting on an indisputable fact of which he shares common knowledge with society or community at large and not subject to rebuttal by evidence – a conclusive fact. Once a court finds that a fact is a fact of common knowledge, it has subsumed in such finding a character of indisputability of that fact.

29. *The second is lack of factuality.* Although the court may take judicial notice of facts or propositions of fact and is expected to take judicial notice of law of the forum, the court cannot take judicial notice of propositions which in substance and effect are legal conclusions nor can the court take judicial notice of propositions of law, as distinguished from principles and elements of the law of the forum which it takes judicial notice of. Legal conclusions cannot be said to be matters of knowledge but of opinion of the tribunal, however accurate or acceptable it may be. In regard to propositions of law they are formulations from the knowledge of the maker. To approve of a tribunal shutting the door against a challenge of such opinion and conclusions strikes at the root of the fairness of the judicial process.

30. *The third is lack of generality.* Judicial notice will not be taken of facts which are not general. Judicial notice does not generally extend to the particular. It is in light of this that judicial notice does not extend to facts which tend to attest the liability or criminal responsibility of a particular person or persons.

The Law applied to this case.

31. It is now convenient to turn to a consideration of the facts that were judicially notice and challenged.

A. The armed conflict in Sierra Leone occurred from March 1991 until January 2002.

H. Groups commonly referred to as the RUF, AFRC and CDF were involved in the armed conflict in the armed conflict in Sierra Leone.

D. The accused and all members of the organized armed factions engaged in fighting within Sierra Leone were required to comply with international humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva conventions of 12 August 1949, and Additional Protocol II to the Geneva Convention.

In regard to these facts the first question that arises from the submission of the Fofana Defence is whether these facts or any one of them are legal findings and characterisations.

32. The two phrases highlighted by the Fofana Defence are: 'armed conflict' and 'organised armed factions'. International humanitarian law operates in the sphere of hostilities and armed conflict. Its substantial purpose is to regulate the conduct of conflicts so as to protect victims and civilians. The rules of international humanitarian law apply to armed conflict. Armed conflict, it has been held,[21] 'exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state.'[22] Whether there is, in a given situation resort to armed force or armed violence or not is, indisputably, a question of fact. Whether that act was by governmental authorities or by organized armed groups or both are questions of fact. It should not take a lawyer to describe, in ordinary language, a violent conflict between armed groups as armed conflict. To describe a situation as a situation of armed conflict is a factual description. The legal consequence of that factual situation is a question of law.[23]

33. The Fofana defence argues that facts A and H are "legal findings and characterizations." Description of a factual situation is not a legal finding. Characterization in the general sense is not peculiar to legal reasoning or thought. In every day life 'characterization' goes on as an automatic process. For instance, a situation of fact may be described as 'chaotic' without having to spell out each fact that leads to such characterization. So also is a situation of 'armed conflict'. The court may be of the view that existence of the factual situation is so notorious that it is futile and a waste of time to dispute it and so take judicial notice of the factual situation. In the present case it is a misconceived to argue that because Article 3 common to the Geneva

[21] In *Prosecutor v. Tadic* Case No. IT-94-1-AR72, Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction, 2 October 1995.

[22] *Ibid*, para. 70

[23] As was succinctly put by a legal writer. "As opposed to the facts which describe what happened, law deals with the question of what ought to be done about those facts." See Paton: *Jurisprudence* 2nd Ed. (1951) p. 156.

Conventions mentioned 'armed conflict' as the factual situation in which obligations of the Conventions may arise the words 'armed conflict' had assumed a technical meaning. If that had been intended the Conventions would have defined the words. It is clear that facts A and H are not legal findings or legal characterization.

34. It is not difficult to agree with the Trial Chamber that the fact that there was a factual situation of armed conflict in Sierra Leone is a notorious fact not subject to any reasonable dispute.

35. Still in respect of facts A and H the submission was made by the Fofana Defence that those facts constitute 'both requirements for and elements of, crimes under Article 3 of the Statute; violations of Article 3 common to the Geneva Conventions and of Additional Protocol II' ("APII") and that "armed conflict" is a necessary condition to criminal responsibility under Article 4(C) of the Statute. It was argued that by those reasons they do not qualify for judicial notice. As has been noticed the factual situation in which common Article 3 of the Geneva Conventions and APII apply is one in which there is armed conflict. To that extent the existence of 'an armed conflict not of an international character' is a *jurisdictional* pre-requirement and an external element of the crime in the sense that the conduct must have been in the context of and associated with the armed conflict. A persuasive guide to the elements of the crime is contained in the Elements of Crime made pursuant to Article 9 of the Statute of the International Criminal Court ('ICC Statute'). Two of the elements of a war crime are:

i) The conduct took place in the context of and was associated with an armed conflict; and

ii) The perpetrator was aware of the *factual circumstances that established the existence of an armed conflict.* [emphasis added]

In regard to these two it was stated in the ICC Elements of Crimes:

> "There is only a requirement for the awareness [of the perpetrator] of the factual circumstances that established the existence of an armed conflict that is

implicit in the terms 'took place in the context of and was associated with an armed conflict'"[24]

36. In this case judicial notice can be taken of the 'factual circumstances that establish the existence of an armed conflict'. The Court cannot take, and has not taken, judicial notice of the awareness of the accused of such factual circumstances or of the legal character of the armed conflict as internal or international.

37. In regard to fact H this appeal is concerned with the fact as judicially modified. In the modified version instead of: *'The organized Armed factions involved in the armed conflict included the Revolutionary Armed Front (RUF),the Civil Defence Force (CDF) and the Armed Forces Revolutionary Council (AFRC)'*, the judicially modified form read as earlier stated in this decision.[25] In regard to facts A, D and H the Fofana Defence submitted as follows:

> "... 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 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"[26]

In regard to facts A and H, these submissions are patently untenable. There is no principle that prohibits judicial notice being taken of time, place and extent of an event or factual situation or circumstances. Indeed, historical facts usually include such things and may be incomplete without them.

38. In regard to fact D, there is nothing I could usefully add to what has been stated in the Decision of the Chamber.

39. Facts K, L, M are as follows:

K The Accused, SAMUEL HINGA NORMAN, was the National Coordinator of the CDF.

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[24] UN Doc PCNICC/200/1/Add.2, 2 November 2000, at page 18.
[25] Para 27.
[26] Fofana Reply, para. 15

L. The Accused, Moinina Fofana was the National Director of War of the CDF.

M. The Accused, Allieu Kondewa was the High Priest of the CDF.

40. The Trial Chamber judicially noticed these facts after a global determination of applicable jurisprudence without specifying which aspect of the applicable jurisprudence was applicable to these facts. It cannot be said that these facts are so obviously founded on a common fund of knowledge as to make them capable of being judicially noticed without enquiry. The Prosecution provided several documentary source materials as foundation of judicial notice of these facts. Several of the documents were published after the Accused had been indicted.[27] The Fofana Defence submitted that these facts are subject to more than reasonable dispute and cannot be facts of common knowledge. Besides, it was submitted, fact L attested to the criminal responsibility of the accused Fofana as a 'superior and co-perpetrator in a joint criminal enterprise'.[28] The Prosecutor argued that there was no criminal connotation in the fact that Accused Fofana held the office of National Director of War. It submitted that judicial notice of this fact does not relieve the Prosecution of its burden to demonstrate for the crimes that are alleged.[29]

41. Article 6 - 1 of the Statute of the Special Court provided for individual criminal responsibility in the following terms:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in subsection 2 to 4 of the present Statute shall be individually responsible for the crime.

Article 6 - 3 provided that:

> The fact that any of the acts referred to in article 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of

[27] For instance, Mazurana, Dyan and Khristopher Carlson, *From Combat to Community: Women and Girls of Sierra Leone*, The Women Waging Peace Policy Commission, (January, 2004) page 11; No Peace Without Justice, *Sierra Leone Conflict Mapping Programme* 9 March 2004.
[28] Fofana Notice of Appeal and Submissions, para16
[29] Prosecution's Response to Fofana's Notice of Appeal and Submissions, para. 23

criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and or reasonable measures to prevent such acts or to punish the perpetrators thereof.

In the light of these provisions the Prosecution was right in its submissions that the mere fact that the Accused Fofana held the office stated in fact L does not connote criminal responsibility.

42. Although the second leg of the Fofana Defence submission must fail, the first leg must succeed. It cannot be said that the office held by any of these accused in a fighting group was so notorious as not to be subject to reasonable dispute. Fact K, L, M cannot be said to be subject of common knowledge and therefore a notorious fact.

43. Fact U as judicially modified is that "In or about November and/or December 1997, the CDF, including Kamajors, launched an operation called "Black December". The original version included at the end of the sentence the words: *"intended to block off the movements of people and food on the highways so as to starve the junta of supplies and support in towns under their control."* The fact evidently lacks the quality of indisputability. Without any indication what 'Black December' was supposed to represent its relevance or quality of indisputability becomes problematic.

44. Fact U should not have been judicially noticed, even in the modified form.

Resolutions of the Security Council.

45. The Trial Chamber judicially noticed a number of resolutions of the Security Council.

46. The Fofana Defence concedes that the Trial Chamber could take judicial notice of the existence and authenticity of resolutions of the Security Council. However, it did not concede that judicial notice could be taken of their

contents. It was argued[30] that those resolutions which the Trial Chamber had taken judicial notice of contained legal findings and characterizations, example of which was Resolution 1181 which had used the term 'armed conflict', to describe the situation in Sierra Leone and Resolution 1346 which had referred to 'forced recruitment' of children which, it was argued, were matters to be proved at the trial. It was further argued[31] that the contents of Security Council resolutions reflect political compromise, and cannot be characterized as neutral and are, therefore, subject to reasonable dispute.

47. The Prosecution responded that the Trial Chamber correctly took judicial notice of the Security Council resolutions in question. It referred to the *Semanza case* in which the Trial Chamber of the ICTR took judicial notice not only of the existence of Security Council resolutions but also of their contents.

48. In *Semanza* the ICTR Trial Chamber took judicial notice of contents of the resolutions of the Security Council without much discussion and merely stated:

> The Chamber 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.[32]

49. To put the question that arises as to the propriety of taking judicial notice of the contents of resolutions of the Security Council in proper perspective, it is expedient to note that the primary responsibilities of the Security Council in pursuance of which it would likely make resolutions include responsibility under Chapter VII of the Charter in respect to threat to the peace, breaches of the peace, and acts of aggression is more relevant. In pursuance of its responsibility under Chapter VII, the Security Council is empowered by article 39 'to determine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore

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[30] Fofana Reply, para 22
[31] Fofana Reply, para 24
[32] *Semanza* Decision, para. 38

international peace and security'. Pursuant to its responsibility under Chapter VII, the Security Council can make binding decisions.

50. Resolutions of the Security Council are the machinery by which it manifests its decisions. It will be a strange thing if an international tribunal refuses to take judicial notice of the contents of such instrument, which would embody the Security Council decision. Any argument that the Court cannot take judicial notice of the contents of resolutions of the Security Council, generally, will be too wide. The question should not be whether judicial notice can be taken of the contents of a resolution of the Security Council but how much of such contents can be subject of judicial notice.

51. Usually, a resolution of the Security Council contains the operative part and the preambular part. The operative part contains the decision of the Security Council and the preambular part usually contains several matters such as, the factors that have been taken into consideration or noted in coming to a decision, matters preceding and relevant to the resolution, the reason why the Security Council had taken the decision in the resolution and all such prefatory matters. The preambular part may contain facts, but they will seldom contain more than statements, for instance, that the Security Council, had taken note of, or considered, certain facts or appreciated or concerned about certain factual situations. For instance, where in the preambular part of a resolution the Security Council states that it is 'deeply concerned' about a particular situation, judicial notice should be confined to the fact that it was so deeply concerned, if such is relevant and in issue, but should not extend to judicial notice of the situation which the Security Council is concerned about. The statement that it was concerned about a situation may be foundational material for judicial notice of the situation, the usefulness of which falls to be considered along with other available foundational material, where the Court is requested to take judicial notice of the situation, as distinguished from evidence of the situation.

52. In regard to judicial notice of the contents of resolutions of the Security Council, while in appropriate cases the court will, as has been seen, be

competent to take judicial notice of their contents, this will depend on the relevance of the facts so noticed in the contents and the limitation pointed out in regard to judicial notice of facts in the preambular part. Without deciding that the Trial Chamber is wrong to have taken judicial notice of the contents of the pertinent resolutions of the Security Council, the Trial Chamber should permit further arguments in the course of the trial as to the particular facts it has taken judicial notice of in the contents and the relevance of such facts to the case in the light of the guidelines given above.

53. In conclusion, my findings are as follows:

i) The Trial Chamber is correct in finding that facts (A) and (H) qualify for judicial notice;

ii) The Trial Chamber was in error in finding that facts (D), (K), (L), (M) and (U) qualify to judicial notice;

iii) Subject to the guidelines given, the Trial Chamber was competent to take judicial notice of the contents of resolutions of the Security Council.

The Annulment Question.

54. The Fofana Defence prayed that the decision of the Trial Chamber be annulled because it did not take into consideration its oral response to the Prosecution's motion for Judicial Notice and Admission of Evidence. The short answer to that submission is that having regard to the contents of the oral submission that facts B, P, and W were facts of common knowledge and that the defence might be able to agree to facts E, Q, F, G, L and U if the wording were amended; the issues considered by the Trial Chamber, which had apparently proceeded on the basis that the Fofana defence was challenging all the facts as capable of judicial notice; and, the findings of the Trial Chamber, no miscarriage of justice has been occasioned by the failure of the Trial Chamber to take into consideration the oral submissions. In the result the decision of the Trial Chamber cannot be annulled on that ground.

DISPOSITION

55. **The appeal is allowed in part as contained in the Decision of the Chamber.**

Justice Emmanuel Ayoola

President