71.

SCSL - 2004 - 15 - PT
(1365 - 1538)

1365.

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: 2 April 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-2004-15-PT)

PROSECUTION'S MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE

Office of the Prosecutor:
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I. INTRODUCTION

1. Pursuant to Rules 73, 89, 92*bis* and 94 of the Special Court's Rules of Procedure and Evidence, the Prosecution hereby moves that the Trial Chamber take judicial notice of the facts set out in **Annex A** attached to this motion; and secondly, that the Chamber take judicial notice of the facts contained in the documents listed in **Annex B** attached to this motion or alternatively admit the said documents into evidence.

II. PROCEDURAL HISTORY

2. On 3 March 2004, the Prosecution filed a "Request to Admit" in the case of the *Prosecutor v Issa Hassa Sesay et al,* requesting the Defence to admit, deny, refuse, or admit/deny in part the statements contained in the said request.
3. The facts stated in the "Request to Admit" are similar in nature to the facts sought to be judicially noticed or admitted in evidence. Part I and II of the Prosecutor's "Request to Admit" is the same as the facts sought to be judicially noticed in Annex A of this Motion. Statements 2,4,5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Request to admit are exactly the same as statements C, F – U and W – AA of Annex A. Statement BB of Annex A is sub-divided into statements 27, 28 and 29 of the Request and Statement CC of Annex A is also sub-divided into statements 30, 31, 32, 33 and 34 of the

Request.

4. The Prosecution states that although the documents listed in Annex A and B are open source materials, most of these documents were disclosed to the Defence before the "Request to Admit" was filed. The following documents numbered 3, 6,7, 9-12, 16-18, 20, 22, 23, 24, 27-32, 34, 36-38, 40, 42,47, 48, 50, 53-56, 58-64, 67-72, 78-82, 85, 87, 89-111, 113-117, 119, 121, 122, 123, 124, 130, 131 133, 135-139, 142 and 144-147 in Annex A were disclosed to the Defence on 4 March 2004. The other documents in Annex A were disclosed to the Defence on 31 March 2004. The documents numbered 1- 58 in Annex B were disclosed to the Defence on 4 March 2004 and the documents numbered 59 – 67 were disclosed to the following Accused on the following dates: *Sesay* on 11 August 2003; *Kallon* 18 September 2003 and *Gbao* 14 October 2003. The documents numbered 68 – 94 were disclosed to the Accused on 31 March 2004.
5. To date, the Defence have not made any legal or factual admissions. On 18 March 2004, Counsel for Accused *Kallon* instructed the Defence Office to file a response on his behalf indicating that the Request was premature in the absence of complete disclosure of all materials by the Prosecution. Also on 18 March 2004, Counsel for Accused *Sesay* filed a confidential reply stating that they are unable to make any admissions at this stage. Counsel for Accused *Gbao* did not respond. It is in this context that the Prosecution makes this Application.

III. ARGUMENTS

6. The Prosecution requests the Chamber to take judicial notice of the facts set out in **Annex A** and the facts contained in the documents listed in **Annex B**, in accordance with Rule 94(A), as they constitute 'facts of common knowledge'.
7. The Prosecution emphasizes that the documents listed in **Annex B** include official and internationally recognised United Nations documents and various humanitarian reports from reliable sources, hence warranting the characterization of facts contained in these documents as 'facts of common knowledge'.
8. Alternatively, the Prosecution requests the Chamber, in the event it finds that any of the facts set out in **Annex A** or the facts contained in the documents listed in **Annex B**, do not amount to 'facts of common knowledge', to admit these facts in evidence under Rule 89(B) and (C) and 92 *bis,* to promote a fair determination of the matter before it, in accordance with the

spirit of the Statute and the general principles of law and that the same is relevant for the purpose for which it is submitted and its reliability is susceptible to confirmation.

Nature of the Court

9. The doctrine of judicial notice serves to expedite proceedings and to promote judicial economy, by allowing the court to take in advance judicial notice of certain facts.[1] The Prosecution submits that, unlike other Tribunals, the Special Court has a very limited time frame with a very limited budget as such time is of the essence in all its proceedings. It submits that in consequence the Court should avail itself of time saving devices, such as taking judicial notice of the facts and documents herein requested.
10. The Appellate Chamber of the Special Court has opined that the United Nations deliberately chose a Special Court, a different model to existing tribunals, as it was concerned to avoid undue delay in holding and conducting trials.[2] Other decisions of the Special Court thus far have also supported this conclusion.[3] The *travaux prepartoire* of the Special Court accentuate the need to have a strong and credible court to expedite the proceedings.[4] It is the Prosecution's argument that taking judicial notice of the facts and documents contained in the Annexes is in line with these conclusions.
11. The Prosecution submits that considering the object and purpose of the Special Court and in the light of its limited temporal existence and resources, it was necessary to promulgate rules

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[1] *Prosecutor v. Semanaza* ICTR-97-20-T, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, 3 Nov. 2000 para 20. See also *Prosecutor v. Simic et al.*, 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 Mar. 1999 ("*Simic* Decision on Judicial Notice, 25 Mar. 1999"), para. 17; *Prosecutor v. Sikirica et al.*, IT-95-8-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 Sept. 2000 ("*Sikirica* Decision on Judicial Notice, 27 Sept. 2000").

[2] *Prosecutor v Sam Hinga Norman, Morris Kallon and Augustine Gbao*, (SCSL-2003-08-PT, SCSL-2003-07-PT and SCSL-2003-09-PT) Decision on the Application for a Stay of Proceedings and Denial of Right of Appeal, 4 November 2003 paras 7-11.

[3] *Prosecutor v. Morris Kallon* SCSL-2003-07-PT Decision on the Defence Motion for an Extension of Time to File Preliminary Motion 14 June 2003 para. 9 the Trial Chamber mentioned the need to maintain and ensure a fair and expeditious trial. Similarly, i*n Prosecutor v Issa Hassan Sesay*, SCSL-2003-05-PT "Decision on the Defence Motion Requesting the Suspension of Delays for filing Preliminary Motions or new Request for an Extension of Delays" 7 November 2003 the Trial Chamber noted the rules were amended to ensure that the proceedings were fair and expeditious. See also *Prosecutor v. Sam Hinga Norman* SCSL-2003-08-PT Decision on Appeal by Truth and Reconciliation Commission of Sierra Leone ("TRC" or "The Commission") and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson delivered on 30 October 2003 to deny the TRC's request to hold a Public Hearing with Chief Samuel Hinga Norman 28 November 2003 para 43.

[4] Security Council Resolution 1315 recognised the need to have a Special Court to expedite the process of bringing justice and reconciliation to Sierra Leone and the Report of the Secretary General of the United Nations the need for everything to be done to expedite the functioning of the Court was stressed.

which effectuate expedited proceedings to ascertain the truth, while at the same time safeguard the rights of the accused. This unique need, prescribed by a given reality, is manifested in the pragmatic approach adopted by the Plenary in its first meeting, where the Judges of the Special Court exercised the authority bestowed upon them by Rule 14 of the Statute to amend the ICTR Rules which were applicable at the time to proceedings before the Special Court. For instance, the Judges decided to discard the elaborate ICTR Rule 92*bis*, in favour of a simplified version which widens the scope of written material which may be admitted as evidence instead of oral testimony.[5]

12. In addition to the above, unlike the other tribunals, the Special Court is located in the country where the atrocities were committed and this is the first time a court and a truth commission with related jurisdiction has been established with the assistance of the United Nations both with the object of finding the truth and assisting in the restoration of peace and justice. Based on these facts, the Prosecution submits that it will be in concordance with the fair determination of the matter before the Court and in accordance with the spirit of the Statute to judicially notice the facts contained in **Annex A** and in the documents listed in **Annex B.**

13. Although national courts will traditionally not take judicial notice of the documents and facts in the Annexes, it is firmly established practice for international courts to take judicial notice of certain facts, as well as of documents from certain sources.[6] In accordance with international jurisprudence, in taking judicial notice of facts and/or documents, the Court must find the balance between the principle of judicial economy and the right of the Accused to a fair trial.[7]

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[5] In the first SCSL Plenary, it was first proposed to keep the language of ICTR Rule 92 *bis*. This proposal, however, was rejected following a comment made by Judge Robertson that "this proposed Rule, while well-intentioned, will in practice prove counterproductive." As an alternative, OTP proposed the version that was finally adopted and still remains at present. See minutes of First plenary as appear in SCSL Registry.

[6] The ICTR and ICTY have taken judicial notice in the following cases: ("*Semanza* Decision on Judicial Notice, 3 Nov. 2000"), para. 23; also see *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), *Prosecutor v. Nsabimana and Nteziryayo* (ICTR-97-29A and B-T), *Prosecutor v. Kanyabashi* (ICTR-96-15-T), *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 98-42-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002 ("*Nyiramasuhuko* Decision on Judicial Notice, 15 May 2002"); *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998 ("*Akayesu* Judgement, 2 Sept. 1998"), para 157, 164 and 627, *Prosecutor v. Mirloslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, Decision on Judicial Notice, 8 June 2000 ("*Kvocka* Decision on Judicial Notice, 8 June 2000"), para. 27, *Prosecutor v. Kovacevic*, IT-97-24-PT (Order on Prosecution Request for Judicial Notice), 12 May 1998.

[7] *Sikirica* Decision on Judicial Notice, 27 Sept. 2000, para. 14; *Simic* Decision on Judicial Notice, 25 Mar. 1999, para. 17; *Nyiramasuhuko* Decision on Judicial Notice, 15 May 2002, para. 36.

Judicial Notice Pursuant to Rule 94(A)

14. Pursuant to Rule 94(A), the Chamber *must* take judicial notice of 'facts of common knowledge'.[8] This Rule provides that:

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

15. The ICTR in *Semanza* interpreted 'facts of common knowledge' as "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".[9] It further held that, "for the present purposes, common knowledge encompasses those facts that are generally known within a tribunal's territorial jurisdiction" and that "there is no requirement that a matter be universally accepted in order to qualify for judicial notice".[10]

16. Furthermore, it is the established practice of the international criminal tribunals to take judicial notice of facts contained in authoritative documents, such as those of the U.N. and affiliated bodies. The ICTR in *Semanza*, citing scholarly writings, specified that historical facts qualify as facts of common knowledge, if they are "so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary".[11] Based on this interpretation, the Tribunal took judicial notice of facts contained in various U.N. documents including the UN Secretary-General, "Report on the situation of Human Rights in Rwanda".[12] The Tribunal also took judicial notice of the fact that between 6 April 1994 to 17 July 1994 there were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification and that between 1 January 1994 and 17 July 1994 in Rwanda

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[8] *Simic* Decision on Judicial Notice, 25 Mar. 1999, para. 17; *Sikirica* Decision on Judicial Notice, 27 Sept. 2000.
[9] *Semanza* Decision on Judicial Notice, 3 Nov. 2000, para. 23; also see *Nyiramasuhuko* Decision on Judicial Notice, 15 May 2002, para. 38.
[10] *Semanza* Decision on Judicial Notice, 3 Nov. 2000, para. 31
[11] *Semanza* Decision on Judicial Notice, 3 Nov. 2000, para. 25. The Tribunal cited from Archibold Criminal Pleading, Evidence & Practice § 10-71 (England, 2000) and also relies on Phipson on Evidence, at § 2-06; United States of America Federal Rule of Civil Procedure § 201(B). The ICTR found further support to this interpretation in the language of Article 21 of the Charter of the International Military Tribunal at Nuremberg, which provides that: 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. Charter of the International Military Tribunal at Nuremberg, Article 21.
[12] *Semanza* Decision on Judicial Notice, 3 Nov. 2000, para. 29.

there was an armed conflict not of an international character.

17. In *Kanyabashi*, the ICTR also took judicial notice of facts stipulated in a range of U.N. reports, including those submitted by the Special Rapporteur for Rwanda, the Commission of Experts on Rwanda and the Security Council.[13] Consequently, the Tribunal took judicial notice of the fact that "the conflict in Rwanda created a massive wave of refugees, many of who were armed, into the neighbouring countries which by itself entailed a considerable risk of serious destabilization of the local areas in the host countries where the refugees are settled." In deciding so, the Tribunal relied on various United Nations reports, including those submitted by the Special Rapporteur for Rwanda, the Commission of Experts on Rwanda and the Security Council.
18. In *Akayesu*, the ICTR took judicial notice of numerous United Nations reports documenting the 1994 massacres in Rwanda notably, the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), and concluded that the material conditions relevant to Additional Protocol II had been fulfilled.[14]
19. The ICTR in *Nyiramasuhuko*, took judicial notice under Sub-rule 94(A) of certain U.N. Security Council documents, but only of their "existence and authenticity", thereby relieving the Prosecution from its duty to establish the authenticity and existence of these documents.
20. The Prosecution submits that judicial notice may be taken not only of *factual* findings but also of *legal* conclusions.[15] Accordingly, the definition of 'common knowledge' may extend to 'legal conclusions'. In *Kvocka* the ICTY held that "even if Rule 94 is concerned only with judicial notice of facts and documentary evidence, no provision in the Statute or the Rules forbids the Trial Chamber, having taken account of the rights of the accused, from drawing legal conclusions based on facts thereby established beyond a reasonable doubt."[16] The Tribunal consequently took judicial notice of the existence of an armed conflict, the existence of a widespread and systematic attack, and of the nexus between these two phenomena.[17]

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[13] *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on Jurisdiction, 18 June 1997, para. 21

[14] *Akayesu* Judgement, 2 Sept. 1998, para. 165.

[15] The Trial Chamber in *Prosecutor v Simic* took a different view and held that judicial notice under Rule 94 can only be taken of factual findings and not legal conclusions. The Chamber refused to take judicial notice of the international nature of the conflict. *Simic* Decision on Judicial Notice, 25 Mar. 1999, para. 22. The ICTR in *Semanza* concurred with *Simic*, holding that "the Chamber cannot take judicial notice of matters, which are unadorned legal conclusions." *Semanza* Decision on Judicial Notice, 3 Nov. 2000, para. 35.

[16] *Kvocka* Decision on Judicial Notice, 8 June 2000, para. 27.

[17] *Kvocka* Decision on Judicial Notice, 8 June 2000, para. 33. The Tribunal took judicial notice of the facts that there was an armed conflict at the times and places alleged in the indictment; that the conflict included a widespread and

21. Following the reasoning in *Kvocka*, the Prosecution submits that when such legal conclusions are drawn from facts of common knowledge, and so long as they do not prejudice the Accused individuals, the Chamber must judicially notice these conclusions. Furthermore, since any such facts which may be deemed 'legal conclusions' do not go to prove the guilt of the individuals Accused, the Prosecution reasserts that taking judicial notice of them will not prejudice the Accused but rather is in the overall interest of justice.
22. The Prosecution submits that Rule 94(A) is of a mandatory nature, *requiring* the Court to take judicial notice of 'facts of common knowledge'. The Prosecution submits that the facts stipulated in **Annex A** attached to this motion, as well as those recited in the documents contained in **Annex B** attached hereto, constitute 'facts of common knowledge', and that therefore the Chamber must take judicial notice of these fact.
23. The Prosecution further submits that these facts are relevant to the present proceedings, as they refer to the factual allegations as stipulated in the Indictments. The Prosecution does not request that the Court takes judicial notice of facts which directly attest to the alleged guilt of any of the Accused. The facts and documents contained in the Annexes do not directly implicate any of the Accused in the commission of criminal acts.[18] Hence, it is submitted that taking judicial notice of these facts will expedite the trial without adversely affecting the right of the Accused to a fair trial or prejudicing any party to these proceedings.
24. In accordance with the view held by the ICTY Appeals Chamber in *Tadic*, the Prosecution submits that it is in the interests of fairness to take judicial notice of these notorious facts.[19] The Prosecution stresses that judicial economy and efficiency should particularly be promoted in this case, given the fact that a number of Accused persons are tried jointly.
25. The Prosecution submits the Trial Chamber may only take judicial notice of notorious facts which cannot be reasonably disputed, "or capable of immediate and accurate demonstration by resorting to readily accessible sources of indispensable accuracy".[20] It respectfully submits

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systematic attack largely against the Muslim and Croatian population; and, that there was a nexus between this armed conflict and the widespread and systematic attack on the civilian population and the existence of the Omarska, Keraterm and Trnopolje camps and the mistreatment of prisoners therein.

[18] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 273.

[19] *Prosecutor v. Tadic*, IT-94-1-AR72 (Transcript of Hearing on Interlocutory Appeal on Jurisdictional Challenge) 7th September 1995 p 108.

[20] *Simic* Decision on Judicial Notice, 25 Mar. 1999, para. 17;

that the facts and documents contained in the said Annexes satisfy this standard.[21]

Admission of Evidence Pursuant to Rule 89 and 92bis

26. The Prosecution submits that, in accordance with the jurisprudence and practice of the international criminal tribunals, the facts stipulated in **Annex A** as well as those contained in the authoritative documents listed in **Annex B,** ought to be judicially noticed by the Chamber under Rule 94(A), as they constitute 'facts of common knowledge'. However, should the Chamber find otherwise, the Prosecution urges the Chamber to judicially notice or admit the same in evidence pursuant to Rules 89 and 92*bis*.

27. Rule 89(B) allows the Special Court to apply any rule of evidence that is consistent with the Statute and with general principles of law. This rule provides that:

> (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.

28. Rule 89(B) grants discretion to the Court to apply any rule of evidence that best favours a fair determination of the matter before it, so long as it is consistent with the Statute and with general principles of law. Accordingly, Rule 89(B) provides a legal basis for the Chamber to take judicial notice of, or admit in evidence, certain facts when the interest of justice so requires.

29. According to Rule 89(C), any relevant evidence is admissible. This rule provides that: "A Chamber may admit any relevant evidence." In deciding which evidence is "relevant", wide discretion is granted to the Trial Chamber.[22] International jurisprudence embodies the

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[21] The Prosecution submits that the facts and documents sought to be judicially noticed are "facts of common knowledge". A clear example is the Lomé Peace Agreement. The Defence has in various motions relied on the provisions of the Lomé Peace Agreement. The Prosecution submits that the Defence relied on this agreement and sought to benefit from the provisions of this agreement. Having done so and the Court having pronounced a decision on the validity of certain provisions of the agreement, the Defence cannot now argue against taking judicial notice of, or admitting, the same. *Prosecutor v. Morris Kallon* SCSL-2004-15-AR72(E) *Prosecutor v. Brima Bazzy Kamara* SCSL-2004-15-AR72(E) Decision on challenge to Jurisdiction: Lome Accord Amnesty 13 March 2004. In addition, Counsel for Accused *Gbao* intervened in this matter.

[22] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 Sept. 2003, para. 18.

principle of "extensive admissibility of evidence."[23] Underlying this principle is the competence of the professional judges to hear evidence and to evaluate it according to its contents, credibility, the manner in which it was obtained, and in light of all other evidence.[24]

30. Under Rule 92*bis*, "information in lieu of oral testimony" may be admitted as 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." The language of the parallel ICTY and ICTR Rule significantly differs from Rule 92*bis,* consequently the jurisprudence of those Tribunals is not beneficial to the Special Court in interpreting its Rule.

31. The Prosecution submits that the adoption of Rule 92*bis* by the ICTY and ICTR was intended to achieve the facilitation of speedy trials.[25] However, subsequent to its adoption, some of the problematic aspects of this Rule's application demonstrate that its restrictive provisions often defeat its purpose of expediting proceedings.[26] The Prosecution argues that the Special Court adopted a rule under which the admission of written statement instead of oral testimony will be encouraged, to facilitate an expeditious - yet fair - trial. Hence, as long as the two prong test of *relevance* and the existence of a *possibility of confirming its reliability* is satisfied, any information may be admitted instead of oral testimony.

32. The Prosecution submits that the documents mentioned in **Annex B** are relevant for the purpose for which they are submitted as they refer to the factual allegations as stipulated in the Indictments. Since the sources of these materials are authoritative sources such as the United Nations and reputable international organisations, the Prosecution submits that the reliability of the information provided in these documents could easily be confirmed by the documents themselves or by oral testimony.

33. The Prosecution submits that unlike Judicial Notice under Rule 94 which is mandatory in

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[23] *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 Mar. 2000 ("*Blaškić* Trial Judgement, 3 Mar. 2000"), para. 34; The ICTY tends to admit most evidence while leaving its assessment to a later stage, when all the evidence is being considered. See discussion in R. May, 'Evidence before the International Criminal Tribunal for the Former Yugoslavia', International Law Forum, Volume 1, No. 4, November 1999, 197 - 201, at p. 199. See also Rule 95.

[24] *Blaškić* Trial Judgement, 3 Mar. 2000, para. 35; *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, 19 Jan. 1998, para. 20.

[25] See ICTR Press Release ICTR/INFO-9-13-22.EN dated 8 July 2002, p. 3: "New Rule 92 *bis* is an important judicial reform measure. It has the potential to further speed up proceedings before the ICTR by significantly reducing as much as possible the consideration of time-consuming evidence inside the courtroom."

[26] For example ICTY Rule 92 *bis* – unlike SCSL Rule 92 *bis* – limits the scope of written material which may be admitted as evidence only to such statements which purport to prove "a matter other than the acts and conduct of the accused as charged in the indictment." See ICTY Rule 92 *bis* (A).

nature, admitting evidence pursuant to Rule 89 and 92bis is discretionary. Accordingly, and in conformity with the language of Rule 89 and 92*bis*, since the documents listed in **Annex B** are relevant to the present proceedings, the Prosecution urges the Chamber to exercise its discretion in favour of admitting the said documents as evidence.

34. The Prosecution notes that these provisions are not only applicable to the Prosecution but the Defence will similarly be able to avail itself of these provisions if it so desires.

IV. CONCLUSION

35. It is the Prosecution's submission, that taking judicial notice of the facts contained in **Annex A** and in the documents listed in **Annex B** is consistent with a fair determination of the matter before the Court, as well as the spirit of the Statute and general principles of law, as it will operate to promote the right of the individuals Accused to an expeditious trial. Furthermore, the Prosecution submits that taking judicial notice of these facts or admitting the same into evidence is consistent with the spirit of the Statute and general principles of law and with a fair determination of the matter before the Court, as it would promote judicial economy without adversely affecting the rights of the individuals Accused to a fair trial.

36. Considering the nature, object and purpose of the Special Court, the Prosecution respectfully submits that taking judicial notice of the facts contained in the Annexes attached to this Motion provide the benefit of judicial economy, is consistent with the rights of the Accused and would significantly expedite the trial. Taking judicial notice or admitting the same into evidence in the manner sought by the Prosecution is also consistent with a fair determination of the matter and is consonant with the spirit of the Statute and general principles of law and the general nature of the Court.

37. For the foregoing reasons, the Prosecution prays that the Trial Chamber take judicial notice of the facts recited in **Annex A** as well as those enumerated in the documents listed in **Annex B,** as facts of common knowledge, pursuant to Rule 94(A), or admit the same in evidence pursuant to Rules 89 and 92*bis* and in accordance with the spirit of the Statute and the principle of fairness.

Done in Freetown, on 2 day of April 2004.

For the Prosecution,

Luc Côté, Chief of Prosecution

Abdul Tejan-Cole, Trial Counsel

PROSECUTOR'S MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE:

ANNEX A

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

1.	Thirteenth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 14 March 2002 (S/2002/267) para 2.
2.	Speech by the President of Sierra Leone His Excellency. Alhaj Dr. Ahmed Tejan kabbah at the ceremony marking the conclusion and disarmament and the destruction of weapons Lungi, 18 January 2002. [available at http://www.sierra-leone.org/index.html]
3.	International Crisis Group, "Sierra Leone, Time for a New Military and Political Strategy," ICG Africa Report N 28, 11 April 2001, Appendix A.

B. The city of Freetown, the Western Area, and the following districts are located in the country of Sierra Leone: Port Loko, Bombali, Koinadugu, Kono, Kailahun, Kenema, Bo.

4.	Map of Sierra Leone, Scale 1:350,000 UNAMSIL Geographic Information Service, 6 May 2002

C. A nexus existed between the armed conflict and all acts or omissions charged in the Amended Indictment as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.

5.	No Peace Without Justice, Sierra Leone Conflict Mapping Program 9 March 2004, Pages Reference to Districts Alleged in the Indictment: Bo 395-423, Bombali 134-153, Koinadugu 169-192, Port Loko 195-226, Kailahun 261-296, Kenema 300-338, Kono 343-391, Western Area (incl. Freetown) 532-564
6.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) paras 2, 21-27
7.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) paras 26, 27, 35-37
8.	UNOMSIL – Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.

9.	Sierra Leone Humanitarian Situation Report 1-17 May 1999, UN Office for the Coordination of Humanitarian Affairs, Sections 2, 3
10.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999 p1-4, 6-54.
11.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 4, 15-23.
12.	Amnesty International, "Sierra Leone 1998 – a year of atrocities against civilians". (Excerpt, pp 1, table of content (p2), 14-28)

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.

13.	**Article 3(1) of the Convention (IV) to the Protection of Civilian Persons in the Time of War Geneva 12 August 1949.**
14.	**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977**

E. Sierra Leone acceded to the Geneva Conventions of 12 August 1949 and Additional Protocol II to the Geneva Conventions on 21 October 1986.

15.	ICRC, States party to the Geneva Conventions and their Additional Protocols Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977.

F. All acts and omissions charged in the Indictment as Crimes Against Humanity were committed as part of a widespread and systematic attack directed against the civilian population of Sierra Leone.

16.	Security Council Resolution 1181 (13 July 1998), para. 1
17.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) paras 2, 21-27
18.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) paras 26, 27, 35-37

19.	UNOMSIL – Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.
20.	Sierra Leone Humanitarian Situation Report 1-17 May 1999, UN Office for the Coordination of Humanitarian Affairs, Sections 2, 3
21.	No Peace Without Justice, Sierra Leone Conflict Mapping Program 9 March 2004, Pages Reference to Districts Alleged in the Indictment: Bo 395-423, Bombali 134-153, Koinadugu 169-192, Port Loko 195-226, Kailahun 261-296, Kenema 300-338, Kono 343-391, Western Area (incl. Freetown) 532-564
22.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999 p1-4, 6-54.
23.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 4, 15-23.
24.	Amnesty International, "Sierra Leone 1998 – a year of atrocities against civilians". (Excerpt, pp 1, table of content (p2), 14-28)

G. The civilian or civilian population referred to in the Indictment were persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities.

25.	Article 3(1) of the Convention (IV) to the Protection of Civilian Persons in the Time of War Geneva 12 August 1949.
26.	Article 4 (1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

H. The organized armed factions involved in the armed conflict included the Revolutionary Armed Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC).

27.	Fourth Report of the Secretary General on the Situation in Sierra Leone, S/1998/249 (18 March 1998), paragraph 6, 20.
28.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 5.
29.	"Sowing Terror", Human Rights Watch, Vol. 10, No. 3 (A), July 1998, pp. 4, 5.
30.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001,

	International Crisis Group Africa Report No. 28, Appendix A.
31.	United States Department of State, "Human Rights Practices for 1998 Report", Sierra Leone Country Report, February 1999, p. 1.
32.	Amnesty International, "Sierra Leone: Childhood – a casualty of conflict", AI Index: AFR 51/69/00, 31 August 2000, p. 1.
33.	The Coalition to Stop the Use of Child Soldiers, "Child Soldiers: Global Report", Sections: Child soldiers, An Overview; Sierra Leone, May 2001.

I. The organized armed group that became known as the RUF, led by FODAY SAYBANA SANKOH aka POPAY aka PAPA aka PA, was founded about 1988 or 1989 in Libya.

34.	Report of the Panel of Experts Appointed Pursuant to the United Nations Security Council Resolution 1306 (2000), December 2000, paragraph180.
35.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 5.
36.	Ibrahim Abdullah, "The Revolutionary United Front of Sierra Leone", in "African Guerrillas", Ed. Christopher Clapham, p. 177.
37.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001, International Crisis Group Africa Report No. 28, Appendix A.
38.	Washington Post, "An Axis connected to Gaddafi; Leaders trained in Libya have used war to safeguard wealth", Douglas Farah, 2 November 2001.

J. The RUF, under the leadership of FODAY SAYBANA SANKOH, began organized armed operations in Sierra Leone in March 1991.

39.	Report of the Secretary-General on the Situation in Sierra Leone, 21 November 1995, S/1995/975, paragraph 2.
40.	"Getting Away with Murder, Mutilation, and Rape: New Testimony from Sierra Leone", Human Rights Watch, Vol. 11, No. 3(A), June 1999, p. 7
41.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 5.

42.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001, International Crisis Group Africa Report No. 28, p. 2 and Appendix A.

K. During the ensuing armed conflict, the RUF forces were also commonly referred to as "RUF", "rebels", and "People's Army" by the population of Sierra Leone.

43.	SLBS Radio Broadcast, 30 May 19:22 GMT. ["Special Message" by the Revolutionary United Front Spokesman Lieutenant David Collins] [available at http://www.sierra-leone.org/index.html]
44.	UN Department of Humanitarian Affairs, Situation Report, p.1 (Reference throughout to rebels as the "People's Army").
45.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001, International Crisis Group Africa Report No. 28, Appendix A.

L. The CDF were comprised of Sierra Leonean traditional hunters, including the Kamajors, Gbethis, Kapras, Tamaboros and Donsos and fought against the RUF and AFRC.

46.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, pp. 11, 12.
47.	Amnesty International, "Sierra Leone: 1998 – a year of atrocities against civilians", 01/11/1998, AI-Index: AFR 51/022/1998, p. 26.
48.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001, International Crisis Group Africa Report No. 28, Appendix A.
49.	The Coalition to Stop the Use of Child Soldiers, "Child Soldiers: Global Report", Sections: Child soldiers, An Overview; Sierra Leone, May 2001.

M. On 30 November 1996, in Abidjan, Ivory Coast, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement which brought a temporary cessation to active hostilities.

50.	The Abidjan Accord (30 November 1996)
51.	Statement by the President of the Security Council, 4 December 1996, S/PRST/1996/46, paragraph 2.

N. However, the active hostilities thereafter recommenced.

52.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 5.
53.	Resolution 1132 (1997), Adopted by the Security Council at its 3822nd meeting on 8 October 1997.
54.	Resolution 1181 (1998), Adopted by the Security Council at its 3902nd meeting, on 13 July 1998.
55.	"Getting Away with Murder, Mutilation, and Rape: New Testimony from Sierra Leone", Human Rights Watch, Vol. 11, No. 3(A), June 1999, p. 7.
56.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001, International Crisis Group Africa Report No. 28, p. 11, Appendix A.

O. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'état on 25 May 1997. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership.

57.	Sierra Leone Broadcasting Service, Radio Announcement, 25 May 1997, 19:30 GMT and 25 May 1997, 18:42 GMT. [available at http://www.sierra-leone.org/index.html]
58.	The Sierra Leone Gazette, Vol. CXXVIII, Thursday, 18th September, 1997, No. 54, Government Notice No. 215, "The Administration of Sierra Leone (Armed Forces Revolutionary Council) Proclamation, 1997"
59.	"The Administration of Sierra Leone (Armed Forces Revolutionary Council) Proclamation, 1997", Supplement to the Sierra Leone Gazette Extraordinary Vol. CXXVIII, No. 34 dated 28th May 1997
60.	Resolution 1132 (1997), Adopted by the Security Council at its 3822nd meeting on 8 October 1997
61.	United States Department of State, "Sierra Leone Country Report on Human Rights Practices for 1997", Released by the Bureau of Democracy, Human Rights, and Labor, January 30, 1998, p. 1.
62.	"Sierra Leone: Time for a New Military and Political Strategy", 11 April 2001,

	International Crisis Group Africa Report No. 28, Appendix A.
63.	Amnesty International 1998 Annual Report on Sierra Leone (the Republic of), p. 1.

P. On 25 May 1997 JOHHNY PAUL KOROMA aka JPK became the leader and Chairman of the AFRC.

64.	Sierra Leone Humanitarian Situation Report 4-5 June 1997, UN Office for the Coordination of Humanitarian Affairs, para. 5.
65.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 8.
66.	1997 Human Rights Report: Sierra Leone, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, January 30, 1998 p. 1.
67.	Amnesty International Annual Report 1998, "AI Report 1998: Sierra Leone" para 3.
68.	Administration of Sierra Leone (Armed Forces Revolutionary Council) Proclamation 1997, published in Sierra Leone Gazette, Extraordinary Vol. CXXVIII, No. 34, 28 May 1997.
69.	P.N. No. 3 of 1997, Dated: 3 September 1997. Published in The Sierra Leone Gazette, VOL. CXXVIII, No. 54, 18 September 1997 p 324.

Q. The AFRC forces were commonly referred to as "Junta", "soldiers", "SLA", and "ex-SLA" by the population of Sierra Leone.

70.	UNHCR Report on Atrocities Committed Against the Sierra Leone Population, UNHCR Conakry Branch Office, 28 January 1999, Victim reports Cases #1-38.
71.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 18, fn 25, p 20, 23.
72.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999, pages 10-41.

R. Shortly after the AFRC seized power, at the invitation of Johnny Paul Koroma, and upon the order of FODAY SAYBANA SANKOH, leader of the RUF, the RUF joined with the AFRC.

73.	1997 Human Rights Report: Sierra Leone, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, January 30, 1998 p. 1.
74.	SLBS Radio Broadcast, 28 May 10:00 GMT. Message from the Revolutionary United Front Command to all RUF combatants. [available at http://www.sierra-leone.org/index.html]
75.	SLBS Radio Broadcast, 30 May 19:22 GMT. ["Special Message" by the Revolutionary United Front Spokesman Lieutenant David Collins] [available at http://www.sierra-leone.org/index.html]
76.	Address by Major Johnny Paul Koroma, Head of State and Chairman of the Armed Forces Revolutionary Council, Freetown, 1 June 1997, para 7. [available at http://www.sierra-leone.org/index.html]
77.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 8.
78.	Amnesty International Annual Report 1998, "AI Report 1998: Sierra Leone" paras 2, 3.
79.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999 p 5.
80.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 11 fn1.

S. The AFRC/RUF Junta forces (Junta) were also commonly referred to as "Junta", "rebels", "soldiers", "SLA", "ex-SLA", and "People's Army" by the population of Sierra Leone.

81.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999, pages 10-41.
82.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 18, fn 25, p 20, 23.
83.	SLBS Radio Broadcast, 30 May 19:22 GMT. ["Special Message" by the Revolutionary United Front Spokesman Lieutenant David Collins] [available at http://www.sierra-leone.org/index.html]
84.	AFRC Press Release, 3 January 1998 located at AFRC Press Releases – Sierra

	Leone Web [available at http://www.sierra-leone.org/index.html]
85.	UNHCR Report on Atrocities Committed Against the Sierra Leone Population, UNHCR Conakry Branch Office, 28 January 1999, Victim reports Cases #1-38.
86.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, p. 8.

T. After the 25 May 1997 coup d' état, a governing body, the Supreme Council, was created within the Junta. The Supreme Council was the sole executive and legislative authority within Sierra Leone during the junta.

87.	Administration of Sierra Leone (Armed Forces Revolutionary Council) Proclamation 1997, published in Sierra Leone Gazette, Extraordinary Vol. CXXVIII, No. 34, 28 May 1997 paras 1-10.
88.	SLBS Radio Broadcast, 29 May 15:26 GMT. [Proclamation issued by the Administration of Sierra Leone Armed Forces Revolutionary Council, Proclamation 1997, in Freetown on 28 May 1997] [available at http://www.sierra-leone.org/index.html]

U. The governing body included leaders of both the AFRC and the RUF.

89.	P.N. No. 3 of 1997, Dated: 3 September 1997. Published in The Sierra Leone Gazette, VOL. CXXVIII, No. 54, 18 September 1997 p 324.
90.	Minutes of an Emergency Council Meeting of the A.F.R.C. held at State House on Monday 11th August 1997, dated 16 August 1997.

V. The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998.

91.	Fourth Report of the Secretary General on the Situation in Sierra Leone, 18 March 1998 (S/1998/249) para. 6,9,17
92.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, p. 9.
93.	International Crisis Group, "Sierra Leone, Time for a New Military and Political Strategy," ICG Africa Report N 28, 11 April 2001, Appendix A.
94.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra

	Leone," Vol. 10, No. 3 (A) July 1998 p 4.

W. After the Junta was removed from power, the AFRC/RUF alliance continued.

95.	Sierra Leone Humanitarian Situation Report 17 July – 10 August 1999, Section 1,2,3,5.
96.	Sierra Leone Humanitarian Situation Report 03-09 October 1999, Section 1,2,3.
97.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) para. 14.
98.	First Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone,12 August 1998 (S/1998/750) paras. 10, 12, 13, 14, 33, 36, 37, 38
99.	Second Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 16 October 1998 (S/1998/960) para. 21.
100.	Third Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 16 December 1998 (S/1998/1176) para. 18.
101.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) para. 2.
102.	Sixth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, 4 June 1999 (S/1999/645) para. 7, 19, 20, 30, 31, 32.
103.	First Report on the United Nations Mission in Sierra Leone (UNAMSIL),6 December 1999 (S/1999/1223) para 3, 4, 7 (note this para and other areas of report of fighting between RUF and AFRC forces in Port Loko and Makeni)
104.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 4,5, 11, 12.
105.	Statement on the historic return to Freetown, Sierra Leone, of the Leaders of the Alliance of the Revolutionary United Front of Sierra Leone and the Armed Forces Revolutionary Council, 3 October 1999. [available at http://www.sierra-leone.org/index.html]

X. On 7 July 1999, in Lomé, Togo, FODAY SAYBANA SANKOH, and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement.

106.	The Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (Article XXXVII Entry

	into Force) signed by Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone and Corporal Foday Saybana Sankoh, Leader of the Revolutionary United Front.

Y. However, active hostilities continued.

107.	Security Council Resolution 1289 (7 February 2000) para 4.
108.	Security Council Resolution 1270 (22 October 1999) para 6.
109.	Sierra Leone Humanitarian Situation Report 03-09 October 1999, UN Office for the Coordination of Humanitarian Affairs, Section 2.
110.	Sierra Leone Humanitarian Situation Report 7-20 November 1999, UN Office for the Coordination of Humanitarian Affairs, Section 2.
111.	Sierra Leonean Humanitarian Situation Report 25 July – 07 August 2000, UN Office for the Coordination of Humanitarian Affairs, Section A.

Z. At all times relevant to the Amended Indictment, members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF) conducted armed attacks throughout the territory of the Republic of Sierra Leone, including Bo, Kono, Kenema, Bombali, Kailahun and Port Loko Districts and the city of Freetown and the Western Area.

112.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 11.
113.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) paras 2, 21-27
114.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) paras 26, 27, 35-37
115.	UNOMSIL – Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.
116.	Sierra Leone Humanitarian Situation Report 1-17 May 1999, UN Office for the Coordination of Humanitarian Affairs, Sections 2, 3
117.	UNHCR Report on Atrocities Committed Against the Sierra Leone Population, UNHCR Conakry Branch Office, 28 January 1999, Victim reports Cases #1-38.
118.	No Peace Without Justice, Sierra Leone Conflict Mapping Program 9 March 2004, Pages Reference to Districts Alleged in the Indictment: Bo 395-423, Bombali 134-153, Koinadugu 169-192, Port Loko 195-226, Kailahun 261-

	296, Kenema 300-338, Kono 343-391, Western Area (incl. Freetown) 532-564
119.	International Rescue Committee, "Situation Report on Human Rights Violations in and around Makeni town, in the Bombali District, Northern Province, Sierra Leone, West Africa," (December 1998 – July 1999)

AA. Targets of the armed attacks included civilians and humanitarian assistance personnel and peacekeepers assigned to the United Nations Mission in Sierra Leone (UNAMSIL), which had been created by United Nations Security Council Resolution 1270 (1999).

120.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 11.
121.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) paras 2, 21-27
122.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) paras 26, 27, 35-37
123.	UNOMSIL – Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.
124.	Sierra Leone Humanitarian Situation Report 1-17 May 1999, UN Office for the Coordination of Humanitarian Affairs, Sections 2, 3
125.	Fourth report of the Secretary-General on the United Nations Mission in Sierra Leone, 19 May 2000 (S/2000/455) – CANNOT PRINT
126.	Statement by the President of the Security Council, United Nations Security Council S/PRST/2000/24 (17 July 2000)
127.	Statement by the President of the Security Council, United Nations Security Council S/PRST/2000/14 (4 May 2000)
128.	No Peace Without Justice, Sierra Leone Conflict Mapping Program 9 March 2004, Pages Reference to Districts Alleged in the Indictment: Bo 395-423, Bombali 134-153, Koinadugu 169-192, Port Loko 195-226, Kailahun 261-296, Kenema 300-338, Kono 343-391, Western Area (incl. Freetown) 532-564

BB. These attacks were carried out primarily to terrorize the civilian population, but also were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the Kabbah government or to pro-government forces. The attacks included unlawful killings, physical and sexual violence against civilian men, women and children, abductions and looting and destruction of civilian property. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property.

129.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, November 1998, p. 11.
130.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) paras 2, 21-27
131.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) paras 26, 27, 35-37
132.	UNOMSIL – Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.
133.	Sierra Leone Humanitarian Situation Report 1-17 May 1999, UN Office for the Coordination of Humanitarian Affairs, Sections 2, 3
134.	No Peace Without Justice, Sierra Leone Conflict Mapping Program 9 March 2004, Page References to background of Conflict: p 33-40 Pages Reference to Districts Alleged in the Indictment: Bo 395-423, Bombali 134-153, Koinadugu 169-192, Port Loko 195-226, Kailahun 261-296, Kenema 300-338, Kono 343-391, Western Area (incl. Freetown) 532-564
135.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999, pages 10-41.
136.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 4, 15-23.
137.	Amnesty International, "Sierra Leone 1998 – a year of atrocities against civilians". (Excerpt, pp 1, table of content (p2), 14-28)

CC. As part of the campaign of terror and punishment the AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped; many of them were abducted and used as sex slaves and as forced labour. Some of these women and girls were held captive for years. Men and boys who were abducted were also used as forced labour; some of them were also held captive for years. Many abducted boys and girls were given combat training and used in active fighting. AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving "AFRC" and "RUF" on their bodies.

138.	Fifth Report of the Secretary General on the United Nations Observer Mission in Sierra Leone, 4 March 1999 (S/1999/237) paras 2, 21-27
139.	Fifth Report of the Secretary General on the Situation in Sierra Leone, 9 June 1998 (S/1998/486) paras 26, 27, 35-37

140.	UNHCR Background Paper on Refugees and Asylum Seekers from Sierra Leone (November 1998), Centre for Documentations and Research, Geneva, p. 11.
141.	UNOMSIL – Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.
142.	Sierra Leone Humanitarian Situation Report 1-17 May 1999, UN Office for the Coordination of Humanitarian Affairs, Sections 2, 3
143.	No Peace Without Justice, Sierra Leone Conflict Mapping Program 9 March 2004, Pages Reference to Districts Alleged in the Indictment: Bo 395-423, Bombali 134-153, Koinadugu 169-192, Port Loko 195-226, Kailahun 261-296, Kenema 300-338, Kono 343-391, Western Area (incl. Freetown) 532-564
144.	Human Rights Watch, "We'll kill you if you cry, Sexual violence in the Sierra Leone Conflict" Vol. 15 No. 1 (A), January 2003
145.	Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999, pages 10-41.
146.	Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 4, 15-23.
147.	Amnesty International, "Sierra Leone 1998 – a year of atrocities against civilians". (Excerpt, pp 1, table of content (p2), 14-28)

Annex B

Request for Authenticity Finding and Admission of Following Documents

THE FOLLOWING DOCUMENTS WERE DISCLOSED TO ALL ACCUSED PERSONS ON MARCH 4, 2004

United Nations Documents

Security Council Resolutions

1. Resolution 1132 (8 October 1997)
2. Resolution 1181 (13 July 1998), para. 1
3. Resolution 1220 (12 January 1999)
4. Resolution 1270 (22 October 1999) para 6.
5. Resolution 1289 (7 February 2000) para 4.
6. Resolution 1299 (19 May 2000)
7. Resolution 1306 (5 July 2000)
8. Resolution 1313 (4 August 2000)
9. Resolution 1346 (30 March 2001)

Secretary General Reports on the Situation in Freetown

10. 21 November 1995 (S/1995/975), paragraph 2.
11. 18 March 1998 (S/1998/249) paragraphs 6, 20.
12. 9 June 1998 (S/1998/486) paras 26, 27, 35-37

Reports of the United Nations Observer Mission in Sierra Leone (UNOMSIL)

13. First Progress Report 12 August 1998 (S/1998/750) paras. 10, 12, 13, 14, 33, 36, 37, 38
14. Second Progress Report 16 October 1998 (S/1998/960) para. 21.
15. Third Progress Report 16 December 1998 (S/1998/1176) para. 18.
16. Fifth Report 4 March 1999 (S/1999/237) paras 2, 21-27
17. Sixth Report 4 June 1999 (S/1999/645) para. 7, 19, 20, 30, 31, 32.

Humanitarian Situation Reports – UN Office for the Coordination of Humanitarian Affairs

18. Sierra Leone Humanitarian Situation Report 5 June 1997, para. 5.
19. Sierra Leone Humanitarian Situation Report 14 July 1997.
20. Sierra Leone Humanitarian Situation Report 8 September 1997.
21. Sierra Leone Humanitarian Situation Report 17 May 1999 Sections 2, 3.
22. Sierra Leone Humanitarian Situation Report 10 August 1999, Section 1,2,3,5.
23. Sierra Leone Humanitarian Situation Report 9 October 1999, Section 1,2,3.
24. Sierra Leone Humanitarian Situation Report 20 November 1999, Section 2.
25. Sierra Leone Humanitarian Situation Report 7 August 2000, Section A.

Other Miscellaneous UN Reports

26. Human Rights Assessment Mission to Freetown 25 January and 1 to 4 February 1999, Findings and Recommendations, pages 3-9.

27. Report of the Panel of Experts Appointed Pursuant to the United Nations Security Council Resolution 1306 (2000), December 2000, paragraph180.

28. Report of the Panel of Experts Appointed Pursuant to UN Security Council Resolution 1343 (S/2001/1015), 26 October 2001

29. UNHCR Report on Atrocities Committed Against the Sierra Leone Population, UNHCR Conakry Branch Office, 28 January 1999, Victim reports Cases #1-38.

Reports of Non-Governmental Organizations

30. Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol. 11, No. 3 (A) June 1999 p1-4, 6-54.

31. Human Rights Watch, "Sowing Terror, Atrocities against civilians in Sierra Leone," Vol. 10, No. 3 (A) July 1998 p 4, 15-23.
32. Human Rights Watch, "We'll kill you if you cry, Sexual violence in the Sierra Leone Conflict" Vol. 15 No. 1 (A), January 2003

33. Human Rights Watch: "World Report 1999: Sierra Leone, Human Rights Developments". (Excerpt, p1)

34. Amnesty International, "Sierra Leone 1998 – a year of atrocities against civilians". (Excerpt, pp 1, table of content (p2), 14-28)

35. Amnesty International, "Sierra Leone: Childhood – a casualty of conflict", AI Index: AFR 51/69/00, 31 August 2000, p. 1.

36. Amnesty International, "The United Nations special conference on Sierra Leone: the protection of human rights must be a priority for the international community", AI Index: AFR 51/14/98, 24 July 1998.

37. Amnesty International Annual Report 1999, "AI Report 1999: Sierra Leone".

38. Amnesty International Annual Report 2000, "AI Report 2000: Sierra Leone".

39. Amnesty International 1998 Annual Report on Sierra Leone (the Republic of), p.1.

40. Médècins Sans Frontières, "Mutilation of civilians on the increase in Sierra Leone", 5 May 1998.

41. Médècins Sans Frontières, MSF 1998 Report, "Atrocities against civilians in Sierra Leone", 1 May 1998.

42. Médècins Sans Frontières, "Mutilation of civilians in Sierra Leone", 23 May 1998.

43. International Rescue Committee, "Situation Report on Human Rights Violations in and around Makeni town, in the Bombali District, Northern Province, Sierra Leone, West Africa," (December 1998 – July 1999)

44. International Crisis Group, "Sierra Leone, Time for a New Military and Political Strategy," ICG Africa Report N 28, 11 April 2001, Appendix A.

45. No Peace Without Justice, Sierra Leone Conflict Mapping Program, 9 March 2004

46. War-Related Sexual Violence in Sierra Leone, Report by Physicians for Human Rights, published 2002. ISBN: 1-879707-37-3.

47. The Coalition to Stop the Use of Child Soldiers, "Child Soldiers: Global Report", Sections: Child soldiers, An Overview; Sierra Leone, May 2001.

Sierra Leone Official Documents

48. Minutes of an Emergency Council Meeting of the AFRC held at the State House on Monday 11th August 1997, dated 16 August 1997.

49. RUF speech to the nation (18 June 1997 – delivered on SLBS).

50. AFRC (Establishment of Office of Principal Liaison Officer) – Decree no. 3 dated 10th July 1997.

51. Government Notices No 215 (P.N. No. 3 of 1997) of 3 September 1997 published in gazettes nos. 52 and 54 of 4 September 1997 & 18 September respectively. Sierra Leone Gazette Nos. 52 and 54.

Other Public Documents

52. Statement on the historic return to Freetown, Sierra Leone, of the Leaders of the Alliance of the Revolutionary United Front of Sierra Leone and the Armed Forces Revolutionary Council, 3 October 1999. (Freetown, Sunday, October 3, 1999)

53. Personal Statement by Lt. JP Koroma on 1 October 1999.

54. Revolutionary United Front's Apology to the Nation, Delivered on SLBS, 18 June 1997.

Maps, Peace Agreements, Treaties

55. The Lome Peace Accord, The Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), 7 July 1999.

56. The Abidjan Peace Accord, The Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), 30 November 1996
57. The Conakry Accord: ECOWAS SIX-MONTH PEACE PLAN FOR SIERRA LEONE 23 OCTOBER 1997 - 22 APRIL 1998, 23 October 1997
58. Ceasefire Agreement Between Government and the Revolutionary United Front, 18 May 1999

THE DOCUMENTS LISTED BELOW WERE ALSO DISCLOSED TO THE ACCUSED ON THE FOLLOWING DATES;

SESAY; AUG 11, 2003: KALLON; SEPT 18, 2003: GBAO; OCT 14, 2003: BRIMA; SEPT 22, 2003: KAMARA; NOV 6, 2003: KANU; NOV 26, 2003

Reports of Governments

59. United States Department of State, "Human Rights Practices for 1998 Report", Sierra Leone Country Report, Released by the Bureau of Democracy, Human Rights, and Labor, February 1999, p. 1, 3-4.

60. United States Department of State, "Sierra Leone Country Report on Human Rights Practices for 1997", Released by the Bureau of Democracy, Human Rights, and Labor, January 30, 1998, p. 1.

Sierra Leone Official Documents

61. Minutes of an Emergency Council Meeting of the AFRC held at the State House on Monday 11th August 1997, dated 16 August 1997.

62. AFRC Proclamation – PN no.3 of 1997, Supplement to Sierra Leone Gazette Vol. CXXVIII, No. 34, dated 28 May 1997.

63. AFRC (Establishment of Office of Principal Liaison Officer) – Decree no. 3 dated 10th July 1997.

64. Constitution of Sierra Leone 1991 – Sections 55, 156

65. Government Notices No 215 (P.N. No. 3 of 1997) of 3 September 1997 published in gazettes nos. 52 and 54 of 4 September 1997 & 18 September respectively. Sierra Leone Gazette Nos. 52 and 54.

Other Public Documents

66. List of RUFP Parliamentary Candidates

THE FOLLOWING HAVE NOT BEEN DISCLOSED

67. Reports of the United Nations Observer Mission in Sierra Leone (UNOMSIL)

68. Thirteenth Report 14 March 2002 (S/2002/267) para 2.

69. Reports of the United Nations Mission in Sierra Leone (UNAMSIL)

70. 6 December 1999 (S/1999/1223) para 3, 4, 7
71. 19 May 2000 (S/2000/455) – CANNOT PRINT

Official Statements by President of the Security Council

72. Statement by the President of the Security Council, United Nations Security Council S/PRST/2000/14 (4 May 2000)

73. Statement by the President of the Security Council, United Nations Security Council S/PRST/2000/24 (17 July 2000)

Other Miscellaneous UN Reports

74. UNCHR Background Paper on Refugees and Asylum Seekers from Sierra Leone, Geneva, November 1998

Reports of Non-Governmental Organizations

75. Partnership Africa-Canada, "The Heart of the Matter, the role of diamonds in Sierra Leone's conflict" (2000)

76. Women Waging Peace and The Policy Commission, "From Combat to Community: Women and Girls of Sierra Leone", Dyan Mazurana and Khristopher Carlson, January 2004.

Sierra Leone Official Documents

77. Minutes dated 23 January 1998 of meeting of AFRC Supreme Council held on 9 December, 1997
78. Government Notice 272 (P.N. No. 3 of 1997), Sierra Leone (SL) Gazette No. 69.

79. Decrees 1, 4, 5, 6 and 7 of 1997. Dec 1 – SL Gazette No. 41; Dec 5 – SL Gazette No. 49; Dec 6 – SL Gazette No. 63; Dec. 7 – SL Gazette No. 66.

80. Changes of Titles Order, 1997 – Public Notice 11 of 1997

81. Record of Deaths 1 – 19th Jan. 1999, Births and Deaths Registry, Freetown, Sierra Leone

Other Public Documents

82. SLBS Radio Broadcast, 25 May 1997, 18:42 GMT

83. SLBS Radio Broadcast, 25 May 1997, 19:30 GMT

84. SLBS Radio Broadcast, 28 May 1997, 10:00 GMT. Message from the Revolutionary United Front Command to all RUF combatants.

85. SLBS Radio Broadcast, 29 May 15:26 GMT. [Proclamation issued by the Administration of Sierra Leone Armed Forces Revolutionary Council, Proclamation 1997, in Freetown on 28 May 1997]

86. SLBS Radio Broadcast, 30 May 19:22 GMT. ["Special Message" by the Revolutionary United Front Spokesman Lieutenant David Collins]

87. Speech by the President of Sierra Leone His Excellency. Alhaj Dr. Ahmd Tejan kabbah at the ceremony marking the conclusion and disarmament and the destruction of weapons Lungi, 18 January 2002.

88. Address by Major Johnny Paul Koroma, Head of State and Chairman of the Armed Forces Revolutionary Council, Freetown, 1 June 1997

89. AFRC Press Release, 3 January 1998

Maps, Peace Agreements, Treaties

90. Map of Sierra Leone, Scale 1:350,000, UNAMSIL Geographic Information Service, 6 May 2002.

91. Article 3(1) of the Convention (IV) to the Protection of Civilian Persons in the Time of War Geneva 12 August 1949.

92. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

93. ICRC List of States party to the Geneva Conventions and their Additional Protocols

94. Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Semanaza* ICTR-97-20-T, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, 3 Nov. 2000.
2. *Prosecutor v. Simic* et al., 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 Mar. 1999.
3. *Prosecutor v. Sikirica* et al., IT-95-8-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 Sept. 2000.
4. *Prosecutor v. Nyiramasuhuko and Ntahobali* (ICTR-97-21-T), *Prosecutor v. Nsabimana and Nteziryayo* (ICTR-97-29A and B-T), *Prosecutor v. Kanyabashi* (ICTR-96-15-T), *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 98-42-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002.
5. *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998 paras 157, 164 and 627.
6. *Prosecutor v. Mirloslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, Decision on Judicial Notice, 8 June 2000.
7. *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on Jurisdiction, 18 June 1997.
8. *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 273.
9. Security Council Resolution 1315
10. Charter of the International Military Tribunal at Nuremberg, Article 21.
11. *Prosecutor v. Bagosora* et al., ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 Sept. 2003, para. 18.
12. *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 Mar. 2000 para. 34;
13. *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, 19 Jan. 1998, para. 20.
14. ICTR Press Release ICTR/INFO-9-13-22.EN dated 8 July 2002

ANNEX 1

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

TRIAL CHAMBER III

Original: English

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

Registrar: Agwu U. Okali

Date: 3 November 2000

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

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

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

Defence Counsel for the Accused:
Charles Achaleke Taku

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

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

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

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

CONSIDERING the Prosecutor's Book of Authorities in the Prosecution's Motion for Judicial Notice (Rules 54 and 73), filed on 17 July 2000 (the "Prosecutor's Book of Authorities");

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

CONSIDERING Appendix A and Appendix B to the Revised Memorial;

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

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

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

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

I

THE PARTIES' SUBMISSIONS

A. The Prosecutor's Submissions

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

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

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

4. In Appendix A to the Motion, the Prosecutor prays that this Chamber takes judicial notice of a

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

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

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

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

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

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

9. In the Preliminary Response, the Defence advances the following arguments. First, the Defence contends that the Chamber should deny the Motion because it was brought pursuant to the authority of Rules 54 and 73, Rules which merely provide authority for directing the parties to make admissions of fact, and therefore do not allow for the judicial notice, and presumptions of facts the Prosecution seeks in

the instant Motion. In this regard, the Defence claims that the Chamber should not permit the Prosecutor to rely upon the authority of Rules 94 and 89(b) as it does in the table of contents to the Revised Memorial.

10. The Defence next expostulates that the Motion should be denied because it is premature. Thus, even if it were proper for the Chamber to take judicial notice or recognize presumptions of fact, the proper time for such an order would be during the course of the trial of this matter but, not before. In addition, the Defence argues that the Motion should be dismissed because it suffers from certain internal inconsistencies, namely the point made in Part III of the table of contents is at odds with points 12 and 15 of the Prosecutor's submissions because the Defence has consistently refused to make admission of fact in this matter since such was never ordered by the Chamber. Similarly, the Defence submits that the Motion must fail because it contradicts the not-guilty plea entered by the Accused and is therefore an impermissible attempt to relieve the Prosecutor of the burden of proof on contested issues of fact which rest exclusively upon the Prosecutor throughout the trial of this matter. More significantly, the Defence claims that granting the Motion at this juncture would constitute a violation of Article 20 of the Statute and result in gross unfairness and prejudice to the Defendant by rendering nugatory the full scope of the testimony of several witnesses appearing on the Prosecutor's Supplementary List of Witnesses, filed on 19 April 2000. Consequently, argues the Defence, the request for judicial notice is premature and should be allowed only when and if such witnesses are called to testify under oath at trial.

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

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

13. The Defence contends that the Prosecutor's Motion is without legal authority. It is neither supported by the Statute of the Tribunal nor by the previous decisions rendered by the Tribunal. Significantly, the Defence maintains that the fact that matters may have been judicially noticed in other cases does not authorize the same result in the instant Motion since those previous decisions are limited to their particular underlying circumstances. Moreover, the Defence underscores that the Prosecutor has

failed to cite to any specific *ratio decidendi* in the Tribunal's previous cases in which judicial notice was taken as would authorize the same result to obtain under the circumstances in this case. In any event, argues the Defence, the Chamber should not predicate judicial notice in the instant matter upon the precedents set in previous decisions since those matters are still being reviewed by the Appeals Chamber and are therefore inconclusive.

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

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

II.

DELIBERATIONS AND FINDINGS

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

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

B. The Prosecution's Motion For Judicial Notice

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

18. As a point of departure, it is imperative that the Chamber identify the issues and interests it

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

1. Judicial Notice Under the Rules

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

a. Policy Reasons for Doctrine of Judicial Notice

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

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

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

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

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

23. The term "common knowledge" is generally accepted as encompassing ". . . those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature." M. Cherif Bassiouni & P.

Manikas The Law of the International Tribunal for the Former Yugoslavia, (United States of America, 1996) p. 952. *See also*; Phipson on Evidence, 14th ed., §2-06-2-16 (England, 1990); Sakar's Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon, 15th ed. (India, 1999) p. 1015; Hon. Roger E. Salhany Criminal Trial Handbook, (Canada, 1994), § 9.5. A common example of a fact of common knowledge are the days of the week. In addition, and perhaps more importantly for the present purposes, "common knowledge" also encompasses those facts that are generally known within a tribunal's territorial jurisdiction. The Law of the International Tribunal for the Former Yugoslavia, at p. 952.

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

c. *Judicial Notice of* Notorious *Facts of History*

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

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

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

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

> (1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports, and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value. . . .
>
> (3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial

notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.[3]

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

2. Judicial Notice of Certain Facts in Appendix A

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

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

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

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

3. *Previous Tribunal Cases Taking Judicial Notice*

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

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

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

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

36. A fundamental question in this case is whether "genocide" took place in Rwanda.

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

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

5. Judicial Notice of Documents in Appendix B

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

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

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

6. Judicially Noticed Facts Serve as Conclusive Evidence

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

7. No Judicial Notice of Inferences

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

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

8. Time for Taking Judicial Notice

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

9. No Presumptions of Fact

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

Conclusion

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

> [T]he Chamber holds that the fact that the [enumerated crimes constituting] genocide [were] indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence its decision in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the

prosecutor. [Footnote omitted] In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.

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

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

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

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

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

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

Arusha, 3 November 2000.

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

[Seal of the Tribunal]

ANNEX A

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

2. The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.

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

international character.

4. Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

5. Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their additional Protocol II of 8 June 1977, having succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols additional thereto of 1977 on 19 November 1984.

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

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

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

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

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

ANNEX B

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

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

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

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

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

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

vii. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his mission to Rwanda, submitted by Mr. Bacre Waly Ndiaye, 8–17 April 1993, including as annex II the

statement of 7 April 1993 of the Government of Rwanda concerning the final report of the independent International Commission of Inquiry on human rights violations in Rwanda since 1 October 1990. UN Document E/CN.4/1994/7/add.1, 11 août 1993.

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

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

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

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

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

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

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

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

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

ANNEX 2

Prosecutor v. Simic et al., 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 Mar. 1999.

IN THE TRIAL CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
25 March 1999

PROSECUTOR

v.

BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC

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

The Office of the Prosecutor

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

Counsel for the accused

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

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("the International Tribunal"),

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Richard May
Presiding Judge

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

[Seal of the Tribunal]

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

ANNEX 3

Prosecutor v. Sikirica et al., IT-95-8-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 Sept. 2000.

IN THE TRIAL CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of:
27 September 2000

PROSECUTOR

v.

DUSKO SIKIRICA
DAMIR DOŠEN
DRAGAN KOLUNDŽIJA

DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

Office of the Prosecutor:

Mr. Dirk Ryneveld
Mr. Daryl Mundis

Counsel for the Accused:

Mr. Veselin Londrovic, for Dusko Sikirica
Mr. Vladimir Petrovic, for Damir Došen
Mr. Dušan Vucicevic, for Dragan Kolundžija

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal"),

BEING SEISED of a "Prosecution's Motion for Judicial Notice of Adjudicated Facts" filed by the Office of the Prosecutor ("Prosecution") on 4 April 2000 ("First Motion"), in which it is proposed that judicial notice be taken of 561 facts from the Tadic and Celebici Judgments[1],

NOTING the "Defence Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts and

Admission of Documentary Evidence", filed by the Defence for the accused Damir Došen on 26 May 2000 ("Došen Defence Response"),

NOTING the "Kolundzija's Defence Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts" filed by the Defence for the accused Dragan Kolundzija, on 26 May 2000 ("Kolundzija Defence Response"),

NOTING the "Prosecution's Notice of Additional Authority in Support of the 'Prosecution's Motion for Judicial Notice of Adjudicated Facts' filed on 4 April 2000", filed by the OTP on 22 June 2000,

NOTING the initial appearance of the accused Duško Sikirica on 7 July 2000,

NOTING the "Order on Prosecution Motion for Judicial Notice of Adjudicated Facts" issued by the Trial Chamber on 1 August 2000, in which the OTP was ordered to serve a similar Motion on the Defence for the accused Duško Sikirica and the accused was ordered to respond to the Motion,

NOTING the "Prosecution's Motion for Judicial Notice of Adjudicated Facts as Against Duško Sikirica" filed on 7 August 2000 ("Second Motion") and "Defence Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts and Admission of Documentary Evidence", filed by the Defence for the accused Duško Sikirica on 4 September 2000 ("Sikirica Defence Response"),

HAVING HEARD the arguments of the parties in open session on 23 June **and 15 September** 2000,

NOTING the arguments of the Prosecution, *inter alia*, that

1. The Tadic and Celebici Judgments contain factual findings which are relevant to this case, including those from the Tadic Judgment relevant to events in the Prijedor municipality and the Omarska, Keraterm and Trnopolje camps;

2. The Tadic Judgment has been subjected to appellate scrutiny and none of the relevant facts set out in the Motions were contradicted by the findings of the Appeals Chamber;

3. The facts referred to in the Motions equate to adjudicated facts as envisaged by Rule 94 (B) of the Rules of Procedure and Evidence ("Rules");

4. The facts referred to in the Motions establish the necessary background to place the crimes charged in context and are relevant to establishing a number of relevant matters, including:

(a) motive, intent, knowledge, preparation and planning by the accused;

(b) that there was a widespread or systematic attack on the Bosnian Muslim and Bosnian Croat population in the Prijedor municipality (an element of proof under Article 5 of the Statute of the International Tribunal ("Statute")) and that the operation of the Omarska, Keraterm and Trnopolje camps was one aspect of this attack;

(c) the maltreatment in the camps reflected the objective of the Bosnian Serb authorities to "ethnically cleanse" the area of Bosnian Muslims and Bosnian Croats, amounting to persecution;

(d) at the time of the commission of the crimes alleged there was an ongoing armed conflict in the Prijedor area;

5. Admission of the facts referred to in the Motions is consistent with the objective of judicial economy, is consistent with the rights of the accused and serve the interests of justice;

6. Admission of the facts referred to in the Motions would expedite the trial and reduce the resources required by the parties to present their cases; and

7. The Trial Chamber should apply the same rationale as Trial Chamber I in the *Kvocka* case[2], which, on the basis of 444 agreed facts, proceeded to make findings of law as to those facts and decided upon elements of the offences[3],

NOTING the position of the Defence for Damir Došen and Duško Sikirica that, of the facts set out in the Motions, 64 could be agreed, and the position of the Defence for Dragan Kolundzija that 101 of the facts set out in the Motions could be agreed,

NOTING that the Defence for the three accused each assert that the Motions should be otherwise rejected, arguing, *inter alia*, that

1. Rule 94 of the Rules relates to facts of common knowledge and the facts in the Motions cannot be so categorised;

2. The facts in the Motions are simplified, inaccurate and misleading and cannot form the basis for making conclusions about events relevant to the amended indictment in these proceedings;

3. The facts in the Motions directly imply individual criminal responsibility of the accused and, in fact, their acceptance would lead to an indirect plea of guilty by the accused;

4. The facts in the Motions taken from the Celebici judgment are not in the proper sense adjudicated as they are the subject of ongoing appellate proceedings;

5. The adoption of facts from the Tadic Judgment violate the right of an accused

(a) to challenge particular facts relevant to the circumstances of his own case;

(b) to challenge facts which in the Tadic case led to legal findings on the application of Articles 3 and 5 of the Statute;

(c) because there was very little cross-examination in that trial on the facts now sought to be admitted as adjudicated facts;

6. The facts admitted under Rule 94 in the *Kvocka* case were admitted by agreement of the parties, which is not the case here; and

7. The admission of the facts in the Motions would have the effect of shifting the burden of proof onto the accused.

NOTING that the Motion is made pursuant to Sub-rule 94 (B), which provides

> "...
>
> (B) At the request of a party or *proprio motu,* a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."

CONSIDERING that the purpose of judicial notice is to achieve judicial economy and a balance between judicial economy and the right of the accused to a fair trial must be achieved,

CONSIDERING that the Trial Chamber can only take judicial notice of facts which are not the subject of reasonable dispute and that facts involving interpretation or legal characterisations of facts are not capable of admission under Rule 94[4],

CONSIDERING that it is appropriate for the Trial Chamber to take judicial notice of facts which are agreed between the parties,

CONSIDERING that, otherwise, the facts which are sought to be admitted by the Prosecution pursuant to Rule 94 (B) are mainly facts which can be characterised either as controversial, or involving legal conclusions or mixed findings of fact and law,

CONSIDERING that the Prosecution also invites the Trial Chamber to draw legal conclusions from the facts sought to be admitted on the basis that this was done by another Trial Chamber of the International Tribunal,

CONSIDERING FURTHER that this Trial Chamber is not bound by decisions of another Trial Chamber and that it is not the purpose of Rule 94 (B) to allow findings on contested matters of law at this stage of the proceedings, the purpose of Rule 94 (B) being to narrow the factual issues in dispute in the relevant proceedings,

CONSIDERING that the Prosecution seek to have admitted under Rule 94 (B) findings of fact from two judgments, one of which is the subject of an uncompleted appeal and that, as regards facts which involve interpretation, both parties should be able to present arguments and evidence on them,

PERSUANT TO Rule 94

HEREBY ALLOWS the Motions in respect of the following facts set out in the Annex to the First Motion which are agreed between the parties:

Paragraphs 1, 2, 5, 11, 12, 13, 21, 22, 23, 24, 25, 29, 35, 37, 38, 39, 41, 46, 63, 78, 79, 80, 83, 84, 85, 96, 97, 99, 100, 101, 103, 104, 105, 106, 107, 108, 113, 115, 119, 120, 123, 126, 127, 268, 269,

of which the Trial Chamber will take judicial notice.

AND OTHERWISE DENIES the Motion.

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

Richard May
Presiding

Dated this twenty-seventh day September of 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

---

1. *Prosecutor v. Duško Tadic*, "Opinion and Judgment", Case No. IT-94-1-T, 7 May 1997; *Prosecutor v Zejnil Delalic & Ors.*, "Judgement", Case No. IT-96-21-T, 16 Novemebr 1998.
2. *Prosecutor v. Kvocka & Ors.*, "Decision on Judicial Notice", Case No. IT-98-30-1-T, 8 June 2000 (hereafter "*Kvocka* Decision").
3. Ibid. This argument appears in "Prosecution's Notice of Additional Authority in Support of the 'Prosecution's Motion for Judicial Notice of Adjudicated Facts'", 4 April 2000 and the Transcript of these proceedings, 23 June 2000, in particular page 359.
4. See, for example, *Prosecutor v. Blagoje Simic &Ors.*, "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", Case No. IT-95-9-PT, 25 March 1999.

ANNEX 4

Prosecutor v. Nyiramasuhuko and Ntahobali (ICTR-97-21-T), *Prosecutor v. Nsabimana and Nteziryayo* (ICTR-97-29A and B-T), *Prosecutor v. Kanyabashi* (ICTR-96-15-T), *Prosecutor v. Ndayambaje* (ICTR-96-8-T), 98-42-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Or. Eng.

Before:
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 15 May 2002

The PROSECUTOR
v.
Pauline NYIRAMASUHUKO
and
Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T

The PROSECUTOR
v.
Sylvain NSABIMANA
and
Alphonse NTEZIRYAYO
Case No. ICTR-97-29A and B-T

The PROSECUTOR
v.
Joseph KANYABASHI
Case No. ICTR-96-15-T

The PROSECUTOR
v.
Elie NDAYAMBAJE
Case No. ICTR-96-8-T

(Case No. 98-42-T)

DECISION ON THE PROSECUTOR'S MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE

The Office of the Prosecutor
Silvana Arbia
Japhet Mono
Jonathan Moses
Adesola Adeboyejo
Gregory Townsend
Manuel Bouwknecht

Counsel for Kanyabashi
Michel Marchand
Michel Boyer

Counsel for Ndayambaje
Pierre Boulé

Counsel for Nsabimana
Josette Kadji
Charles PatieTchakoute

Counsel for Nteziryayo
Titinga Frédéric Pacere
Richard Perras

Counsel for Nyiramasuhuko
Nicole Bergevin
Guy Poupart

Counsel for Ntahobali:
Duncan Mwanyumba
Normand Marquis

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson (the "Chamber");

BEING SEIZED OF

(i) The "Prosecutor's Motion for Judicial Notice and Admission of Evidence", with Annexes A, B and C, and the "Prosecutor's Book of Authorities for Judicial Notice and Admission of Evidence", filed on 23 May 2001 (the "Motion");

(ii) The "Addendum to Prosecutor's Motion for Judicial Notice and Admission of Evidence" containing all available documents in French from the "Prosecutor's Book of Authorities", filed on 6 June 2001 (the "Addendum");

CONSIDERING the following submissions;

For Kanyabashi:

(a) The "Requête urgente demandant un délai supplémentaire pour produire une réponse à la requête du Procureur visant à obtenir un constat judiciaire[1]", filed on 31 May 2001;

(b) The "Preliminary Response by the Accused Joseph Kanyabashi to the Prosecutor's Motion for Judicial Notice", filed on 6 June 2001 followed by the "Prosecutor's Reply to Kanyabashi's Preliminary Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence", filed on 7 June 2001;

(c) The "Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence", filed on 13 July 2001, followed by the "Prosecutor's Reply to Kanyabashi's Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence", with amended Annexes attached on 20 July 2001;

(d) The "Requête de Joseph Kanyabashi demandant la permission de produire une duplique à la réplique du Procureur concernant la requête aux fins de constat judiciaire et d'admission de preuve", [2] filed on 30 July 2001;

(e) Noting Counsel's letter to the Presiding Judge of Trial Chamber II concerning mistakes in the translation of his response to the Prosecutor's Motion for Judicial Notice dated 10 September 2001;

For Nyiramasuhuko and Ndayambaje:

(a) The "Motion by the Accused Pauline Nyiramasuhuko and Élie Ndayambaje to Rule Inadmissible the Prosecution Motion for Judicial Notice and Admission of Evidence", filed on 30 May 2001, followed by the "Prosecutor's Response to Nyiramasuhuko and Ndayambaje's Motion to have Ruled Inadmissible the Prosecutor's Motion for Judicial Notice and Admission of Evidence", filed on 4 June 2001;

(b) The "Réponse préliminaire à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles", filed on 21 August followed by "Premier des compléments de la réponse à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles", [3] filed on 22 August 2001;

(c) The "Réponse de Pauline Nyiramasuhuko à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles"[4], filed on 21 August 2001;

(d) Noting the "Requête d'extrême urgence sollicitant l'autorisation de déposer une duplique à la réplique du Procureur à la réponse de Pauline Nyiramasuhuko à la requête aux fins de constat judiciaire et d'admission de présomptions factuelles, aux vues d'éléments nouveaux n'apparaissant pas dans la requête initiale du procureur" as well as a "Duplique de Pauline Nyiramasuhuko à la réplique du Procureur à notre réponse à sa requête aux fins de constat judiciaire et d'admission de présomptions factuelles" [5], filed on 12 September 2001;

(e) Noting the "Requête en extrême urgence aux fins d'obtenir de la Chambre II une audition des parties sur la question du constat judiciaire et d'admission de preuve (articles 73, 89, 94 du Règlement de procédure et de preuve et Article 20 du Statut)"[6], filed on 17

September 2001 in which Counsel for Ndayambaje requested a hearing on the Prosecutor's Motion for Judicial Notice;

For Nsabimana:

(a) The "Response by the Defence to the Prosecutor's Motion of 23 May 2001 for Judicial Notice and Admission of Evidence," filed on 7 June 2001 by Accused Sylvain Nsabimana followed by the "Prosecutor's Reply to Nsabimana's Response to the Prosecutor's Motion Filed 23 May 2001 for Judicial Notice and Admission of Evidence", on 13 June 2001;

(b) The "Supplementary Submissions by S. Nsabimana on the Prosecutor's Motion for Judicial Notice and Admission of Evidence", filed on 20 June 2001 followed by the "Prosecutor's Reply to Nsabimana's Supplementary Observations to the Prosecutor's Motion Filed 23 May 2001 for Judicial Notice and Admission of Evidence", on 25 June 2001;

(c) The "Responses by Sylvain Nsabimana to the Prosecutor's Motions of 23 May and 5 July 2001, for Judicial Notice and Admission of Evidence", filed on 7 August 2001;

For Nteziryayo:

(a) The "Response of the Accused Alphonse Nteziryayo to the Prosecutor's Motion of 23 May 2001 for Judicial Notice", filed on 27 June 2001 which was followed by the "Réponse de l'Accusé Alphonse Nteziryayo à la requête du Procureur aux fins de constat judiciaire et d'admission de prevue"[7], filed on 21 August 2001;

(b) The "Réplique à 'Prosecutor's Supplemental Reply in Support of her Motion for Judicial Notice and Admission of Evidence' uniquement sur la question des délais",[8] filed on 13 September 2001, in which Counsel reiterates that Nteziryayo's Reply was sent on 20 August 2001 within the prescribed time frames;

For Ntahobali:

The "Reply to the Prosecutor's Motion for Judicial Notice and Admission of Evidence", filed on 21 August 2001;

For the Prosecutor:

(a) The "Prosecutor's Supplemental Reply in Support of Her Motion for Judicial Notice and Admission of Evidence", filed on 3 September 2001;

(b) The "Prosecutor's Additional Reply in Support of Her Motion for Judicial Notice and Admission of Evidence", filed on 18 September 2001;

BEING SEIZED OF the "Prosecutor's Motion for a Scheduling Order for Judicial Notice and Admission of Evidence", filed on 5 July 2001, which the Chamber acknowledges has been withdrawn following the Prosecutor's request made at paragraph 23 of her Reply to Kanyabashi's Response. This was followed the "Reiteration of the Withdrawal of the Prosecutor's Motion for a Scheduling Order for Judicial Notice and Admission of Evidence," filed on 31 July 2001. This Scheduling Motion is thereby declared moot.

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 73, 89 and 94;

HAVING HEARD the Parties on 16 November 2001,

HEREBY DECIDES THE MOTION

I. Preliminary Issues

i) Background

1. The Prosecutor filed a Motion with attached Annexes in English on 23 May 2001. Thereafter, the Defence for Accused Kanyabashi, Ndayambaje, Nteziryayo, Nsabimana, Nyiramasuhuko and Ntahobali in the "Butare Cases" filed written Responses and/or Counter Motions.

2. Having heard the Parties on 16 November 2001, the Chamber finds that all Defence Requests to publicly hear the Parties on the Motion are declared moot.

3. Initially, Counsel for the Defence requested a translation of the Motion into French as well as an extension of the deadline to respond. Counsel argued that, pursuant to Article 20 of the Statute and Rule 3 of the Rules, the Accused should receive the Motion and its Annexes in French, a language understood by both Counsel and the Accused.

4. By memorandum dated 12 July 2001, the Chamber directed the Registry to inform the Parties that Defence Counsel should file their replies to the Motion by 20 August 2001 and that the Prosecutor should file a response to the replies by 3 September 2001. The Chamber also directed the Registry to translate immediately the Motion and its Annexes into French.

5. Consequently, the Chamber considers that all requests for extension of time for filing responses to the Motion were rendered moot, given the extension of time until 20 August 2001. The Chamber admits all responses faxed on 20 August 2001 and subsequently filed by the Registry on 21 August 2001. Exceptionally, the Chamber has considered the further substantial submission by Counsel for Ndayambaje ("Premier des compléments de la réponse à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles"[9]) filed on 22 August 2001, which appears to have been faxed on 21 August 2001, after notice of late filing was given by the Defence.

6. In view of the prescribed deadlines and the fact that Counsel for Nyiramasuhuko exercised his right to respond, the Chamber dismisses Nyiramasuhuko's "Requête d'extrême urgence sollicitant l'autorisation de déposer une duplique à la réplique du Procureur à la réponse de Pauline Nyiramasuhuko à la requête aux fins de constat judiciaire et d'admission de présomptions factuelles, aux vues d'éléments nouveaux n'apparaissant pas dans la requête initiale du procureur", filed on 12 September 2001. Accordingly, the Chamber will not consider the "Duplique de Pauline Nyiramasuhuko à la réplique du Procureur à notre réponse à sa requête aux fins de constat judiciaire et d'admission de présomptions factuelles", also filed on 12 September 2001.

ii) Timing of Filing of the Motion

7. Certain Defence Counsel objected to the filing of the Motion so close to the commencement of trial and argued that the Prosecutor had failed to act with diligence. The Defence maintain that if the Chamber rules on the Motion after commencement of trial, such Decision would infringe upon the rights

of the Accused to know the basis for cross examination of Prosecution witnesses. Consequently, the Defence request the dismissal of the Motion.

8. The Prosecutor refutes this objection and argues *inter alia* that there is no time limit under Rule 94 and recalls that the "Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54" was rendered after the commencement of trial (the *Prosecutor v. Semanza*, Case No. ICTR-95-1-T, 3 November 2000, the "Semanza Decision of 3 November 2000").

9. The Chamber agrees with the Prosecutor that there is no time prescription under Rule 94 of the Rules and, accordingly, denies the "Motion by Accused Pauline Nyiramasuhuko and Elie Ndayambaje to Rule Inadmissible the Prosecution Motion for Judicial Notice and Admission of Evidence".

II. The Motion

(i) The Prosecution

10. The Prosecutor recalls that the Defence have not made any legal or factual admissions. On that basis, the Prosecutor requests that the Chamber take judicial notice, pursuant to Rule 94 of the Rules, of the facts set out in Annexes A and B.

11. Pursuant to Rule 94(A) of the Rules, the Prosecutor requests that the Chamber take judicial notice of the facts set out in Annex A and of the content of the documents listed in Annex B because they are of "common knowledge." In support of her argument, the Prosecutor submits a "Book of Authorities."

12. Pursuant to Rule 94(B) of the Rules, the Prosecutor requests that the Chamber take judicial notice of "adjudicated facts" in Annexes A and B, as facts set out in Annex A may also constitute "adjudicated facts". The Prosecutor submits that Annex B consists of "documentary evidence from other proceedings" which has previously appeared in various judgements of the Tribunal and could therefore be judicially noticed under the said sub-Rule.

13. Alternatively, under Rule 89(B) of the Rules, the Prosecutor requests the Chamber to take judicial notice of the facts and documents in Annex A and B to which Rule 94(B) cannot be applied, in accordance with fair and general principles of law.

14. Relying on Rule 89(C) of the Rules, the Prosecutor also requests the Chamber to admit as evidence the documents contained in Annex C to her Motion, consisting of internationally recognised official United Nations (UN) documents or humanitarian reports.

15. The Prosecutor relies upon the jurisprudence of the Tribunal and of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") as well as on the doctrine of judicial notice. The Prosecutor submits that she seeks to ensure judicial economy and uniformity of judgements on general facts regarding the events in Rwanda. She emphasises that, efficiency and economy are of great importance in the "Butare Cases", given the large number of Accused jointly tried.

16. The Prosecutor does not request that the Tribunal take judicial notice of ultimate facts in the present case that directly attest to the alleged guilt of any of the six Accused. On the contrary, the Prosecutor contends that taking judicial notice will not prejudice any Party to these proceedings.

(ii) The Replies by the Defence

Criteria of Notoriety:

17. The Defence argue that sub-Rules 94 (A) and (B) are subject to the same criteria, namely that only a notorious fact, which cannot be contested by a "reasonable man", can be judicially noticed. Counsel for the Defence submit that the scope of Rule 94(A) is more restrictive than that of Article 21 of the Nuremberg Charter quoted by the Prosecutor and should be limited to "matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary" (Quoting Archbold, Criminal Pleading, Evidence and Practice, 2000, para. 10-71, page 1213).

Criteria of Specificity (Rule 94 A):

18. The Defence argue that accuracy is the essence of judicial notice and that the Tribunal's authority to alter the Prosecutor's submissions cannot be used in relation to disputable facts in respect of time, location or over-generalisations. Unclear facts cannot constitute facts of "common knowledge", which is the only proper basis for judicial notice. Most Defence Counsel contest all facts referred to in parts I, II and V of Annex A for, *inter alia,* their imprecision and contestable nature which could prejudice the Accused. The Defence maintain that the factual admissions sought by the Prosecutor are not of a general historical nature and differ from those of which judicial notice was taken in the "Semanza Decision of 3 November 2000". The Defence argue that the sources on which the Prosecutor relies in seeking judicial notice of notorious facts are incorrect. Specifically, the Defence question the use of the Steering Committee Reports which have never been entered into evidence before this Tribunal or challenged by any Defence Counsel.

Objection to Facts Directly Supporting an Indictment:

19. The Defence allege that some facts in Annex A directly support counts of the Indictment and should not therefore be considered as "common knowledge". Rather, these facts must be discussed following a proper adversarial proceeding consistent with the provisions of Rule 89(B) of the Rules. Elements of an offence or elements that tend to prove the guilt of an Accused should not be judicially noticed.

Annex B:

20. The Defence argue that the Prosecution erroneously reads Rule 94(A): the expression "proof of facts" is applicable not to documents, but only to facts which are unalterable, impersonal and do not require supplementary proof. Generally, Counsel for the Defence do not object to judicially notice documents which cites Rwandan Laws, if such documents do not refer to interpretation or enforcement of the laws by Rwandan tribunals. Accordingly, judicial notice can be taken only of the materiality of these norms without reference to their applicability, and only if these laws and regulations contain any successive modifications.

Annex C- Authenticity of Documents:

21. With regard to the request pursuant to Rule 89(C) and 94(B) for judicial notice of documents in Annex C, certain Counsel argue that they have not been afforded the opportunity to verify the authenticity of the documents for which the Prosecutor seeks judicial notice or admission into evidence because they have not been served with the documents. Counsel for Nteziryayo argues that to take judicial notice of facts contained in official reports will be an arbitrary endeavour contrary to the finding of individual responsibility. Counsel maintains that the Prosecutor has not demonstrated that she should

depart from the established rules of evidence, namely, admissibility and probative value. Defence Counsel submit that an opinion or a conclusion of a legal nature is not acceptable as evidence unless submitted by an Expert Witness. Counsel further argue that there is no general consensus about the weight to be afforded of UN documents.

Judicial Notice of Genocide:

22. The Defence recall the wording of the Semanza Decision of 3 November 2000 where the Chamber held that the existence of a genocide in Rwanda is so fundamental that it requires the submission of formal proof rather than a judicial notice process and that, a Chamber may take judicial notice of the authenticity of documents without taking judicial notice of their contents. The Defence argue that in the *Akayesu* and the *Kayishema & Ruzindana* Judgements, the judicially noticed facts were general historical facts and a combination of law and fact pertaining to the existence of genocide in 1994 in Rwanda, which was not imputable to the guilt of any of the accused. The Defence object to judicial notice of the crime of genocide or incitement to commit genocide in Rwanda in 1994, as these crimes must be proved.

Rule 94(B):

23. The Defence, quoting the ICTY Sikirica Decision of 27 September 2000, maintain that most of the facts alleged by the Prosecutor do not arise from final judgements, contrary to doctrine and jurisprudence. Moreover, several Counsel allege that the judgements rendered in previous cases by the ICTY and the ICTR are not conclusive in the present case. Other counsel reject the use by the Prosecutor of the Appeals Chamber's decisions in the *Akayesu* and *Kayishema and Ruzindana* cases, and argue that each decision has only confirmed the guilt of each Accused and should therefore be considered only as *res judicata* in respect of each particular case, and not in respect of each factual finding made in these judgements. The Chamber is also cautioned to be prudent when looking at the definitive judgements against *Akayesu, Kayishema and Ruzindana* with regard to facts which were not challenged by the Defence by way of cross-examination, or which are collateral or foreign to the specific charges brought against the present six Accused, or could be contentious or even prejudicial in a trial involving six accused holding different functions during the alleged events. Moreover, the Defence argue that the facts to which Rule 94(B) may apply cannot flow from guilty pleas or from facts which were voluntarily admitted by an accused. This is made clear in the Semanza Decision of 3 November 2000. Finally, following the ICTY in the Simic Decision of 25 March 1999, the Defence indicate that Rule 94 is not intended to cover legal consequences inferred from facts. The Defence further argue that the Prosecutor attempts to by-pass the Semanza Decisions on judicial notice by inviting the Chamber to take judicial notice of both legal findings and of the intent-or *mens rea*-constitutive of the crimes.

Rule 89 (B):

24. The Defence maintain that, under the general principal of law *generalibus specialia derogant* and pursuant to Rule 94, which is a special Rule governing Judicial Notice, Rule 89 (B) is therefore inapplicable. The Defence recall that such has been the interpretation of the Rules in the Semanza Decision of 3 November 2000.

Expert witnesses reports:

25. The Defence for Nteziryayo argue that judicial notice should not be taken of facts supported by reports of expert witnesses that will be called to testify at trial, such as experts Desforges and Guichaoua.

(iii) Prosecution's Replies

26. In her Reply to Kanyabashi's Responses, the Prosecutor has submitted Amended Annexes A, B and C; these Annexes, which incorporate changes in selected paragraphs, were subsequently itemised in the Prosecutor's Addendum filed on 6 June 2001.

27. The Prosecutor maintains that there is no uniformly consistent application of Rule 94 in the jurisprudence of either *ad hoc* tribunal. Indeed, under Rule 94(A), matters of common knowledge *shall be* subject to judicial notice, whereas adjudicated facts pursuant to Rule 94(B) *may* be subject to judicial notice (their emphasis).

28. As to judicial notice of facts listed in Annex A, the Prosecutor argues that judicial notice can be taken of selective facts that are relevant to the case. The Prosecutor further maintains that she has no duty to "ensure accurate representation of events throughout Rwanda in 1994". Moreover, the Prosecutor submits that the Rules do not require any degree of specificity for judicial notice of adjudicated facts or facts of common knowledge. Finally, the Prosecutor relies on the Chamber's authority to act *proprio motu* to alter the wording of the facts, as did Trial Chamber III in the "Semanza Decision of 3 November 2000" to render the fact "sufficiently notorious to be judicially noticed".

29. In relation to the various facts contested by the Defence, the Prosecutor argues *inter alia*, that some of the paragraphs in Amended Annex A are directly taken from judgements affirmed by the Appeals Chamber and have therefore acquired the status of adjudicated facts or constitute common knowledge. Alternatively, the Prosecutor invites the Chamber to find a better wording, but in any case, finds the Defence's submissions without any merit.

30. The Prosecution considers it to be anomalous that Rule 94 should be used to limit questions of fact that are appropriately adjudicated in previous cases of common knowledge but not questions of law, particularly when the two are almost impossible to distinguish.

31. With regard to adjudicated facts, the Prosecutor submits that public notoriety is not a necessary element of judicial notice under Sub-Rule 94(B). The Prosecutor accepts the Defence contention that facts voluntarily admitted by an accused do not constitute "adjudicated facts" within the meaning of Rule 94(B). Rather, the Rule allows a Trial Chamber to rely on "adjudicated" facts without further qualification or agreement between parties as a pre-requisite. The Prosecution refers to the adjudicated facts in the final Judgements in *Akayesu*, *Kayishema & Ruzindana*, *Kambanda*, *Serushago* and *Ruggiu*.

32. With regard to judicial notice of legal conclusions not involving *mens rea* listed in Amended Annex A, the Prosecutor maintains that the legal conclusions are facts of common knowledge or authoritatively adjudicated facts and that there should be no prejudice to the accused if those conclusions do not prove the guilt of the accused. As to judicial notice of *mens rea,* pursuant to Sub-Rules 94(A) and (B), the Prosecutor reiterates that it would be anomalous to take only judicial notice of the factual elements of a crime when a crime can be established only when the factual elements are combined with the requisite *mens rea*. Accordingly, the Prosecutor's arguments depart from the "Semanza Decision of 3 November 2000".

33. On the basis of the above reasoning the Prosecutor addresses the specific facts contained in Amended Annexes A, B and C. Amended Annex A contains minor changes in the wording of six factual allegations (paras. 5, 22, 29, 40, 43 and 79) and includes additional references in support of six other facts (paras. 1, 10, 21, 28 and 74), while Amended Annexes B and C incorporate changes previously made in the Addendum. Regarding Amended Annex A, the Prosecutor agrees that not every fact in the

documents rises to the level of common knowledge. Therefore, she does not rely on any one document but rather on a range of authoritative sources, which, all together, establish that the propositions are of common knowledge to a reasonable person. However, the Prosecutor maintains that the Defence is free to examine experts on all matters relating to the specific application of the facts contained in Amended Annex A to the events in Butare.

34. In relation to admission into evidence of documents contained in Amended Annex C, the Prosecutor argues that, pursuant to Rule 89 (C), these documents are thereby afforded a "lower level of significance before the trial Chamber" than the very same documents were allowed in previous jurisprudence.

35. The Prosecutor prays the Trial Chamber to take judicial notice of facts contained in amended Annexes A and B as facts of common knowledge, pursuant to Rule 94(A), or as adjudicated facts or documentary evidence from other proceedings pursuant to Rule 94(B) or in accordance with fair and general principles of law pursuant to Rule 89(B); and to admit into evidence the documents listed in amended Annex C under Rule 89(C).

AFTER HAVING DELIBERATED,

Rule 94: Judicial Notice

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

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

36. The Chamber first recalls that when taking judicial notice "a balance between judicial economy and the right of the accused to a fair trial must be achieved"[10]. As a preliminary matter, the Chamber notes that the facts presented in Annex A were not agreed upon through any admission process. Indeed, the Chamber notes that almost all facts listed in Annex A of the Motion are contested by the Defence.

37. The Chamber notices that, in its submissions, the Prosecution has failed to clearly identify for each of the 80 facts listed in Annex A, whether it seeks judicial notice of those facts as "facts of common knowledge" (Rule 94(A)) or as "adjudicated facts or documentary evidence from other proceedings" (Rule 94 (B)). As indicated in the Decision of 22 November 2001 on judicial notice in the Ntakirutimana Cases (ICTR-96-10-T and ICTR-96-17-T), facts of common knowledge and adjudicated facts "constitute different, albeit possibly overlapping categories: a fact of common knowledge is not necessarily an adjudicated fact, and vice versa". The Chamber is of the opinion that one of the purposes of judicial notice is to ensure judicial economy. However, the Prosecutor's Motion, which requested the Chamber to assess or to reformulate 80 submissions as to their qualifications as facts of common knowledge or adjudicated facts, did not promote judicial economy.

38. With regard to judicial notice of facts, pursuant to Rule 94(A), the Chamber notes that the expression "common knowledge" was interpreted in the "Semanza Decision of 3 November 2000" to be "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" as defined in various legal textbooks. This Decision further states that: "[F]or the present purposes, common knowledge encompasses those facts that are generally known within a tribunal's territorial jurisdiction"[11] and that "once a Trial Chamber deems a fact to be of common knowledge under Rule

94, it must determine also that the matter is reasonably indisputable"[12]. The same Chamber adds that "there is no requirement that a matter be universally accepted in order to qualify for judicial notice"[13]. Nonetheless, the same Chamber rejected the use of judicial notice for unadorned legal conclusions.[14]

39. The Chamber is of the opinion that judicial notice of facts which can be characterised either as controversial or which involve drawing legal findings from the facts sought to be admitted or from their interpretation, shall not be judicially noticed. Judicial notice shall only be taken of facts that are not subject to reasonable dispute and "that facts involving interpretation or legal characterisations of facts are not capable of admission under Rule 94"[15]. Disputable facts should not form part of the proceedings by way of judicial notice but should be determined after the Parties have submitted their evidence which will subsequently be discussed by the opposing Party following an adversarial procedure. (Our emphasis).

40. The Chamber notes that, pursuant to Rule 94(B) of the Rules, the facts that may be judicially noticed must have been adjudicated in other proceedings and must relate to matters at stake in the current proceedings. As stated in the Ntakirutimana Decision of 22 December 2001, "unlike Rule 94 (A), *litra* (B) therefore is discretionary. It is for the Chamber to decide whether justice is best served by its taking judicial notice of adjudicated facts." Concurring with the Appeals Chamber Decision in the Kupreskic case, the Chamber is of the view that pursuant to Rule 94 (B), it may not take judicial notice of findings of fact from judgements that are the subject of an uncompleted appeal[16], or of judgements based on guilty pleas, or of admissions made by the accused during the trial. (Our emphasis).

JUDICIAL NOTICE OF FACTS IN ANNEX A

Historical Description of Events Prior to 1994 (1 to 40)

1. Prior to 1897, Rwanda was a complex and advanced monarchy.

41. The Defence contest the term "advanced", its implications and the authorities quoted.

42. The Prosecution considers that the distinction is pedantic and indicates that it is taken directly from the *Akayesu* Judgement affirmed by the Appeals Chamber. Nevertheless, if the Chamber disagrees, the word advanced could be deleted.

2. The monarch ruled the country through his official representatives who were drawn from Tutsi nobility.

3. The kingdom of Rwanda was marginally administered by Germany until 1899.

43. The Defence allege that the date is erroneous according to the sources, and that there is lack of agreement as to the date until when the Federal Republic of Germany administered Rwanda. The information should not be considered as common knowledge

4. After World War I, the League of Nations mandated Belgium to administer the country.

5. In the early 1930's, the Belgians instituted a system of national identification cards bearing the terms Hutu, Tutsi and Twa under the category of ethnicity.

44. The Defence submit that the temporal reference is vague and that the wording suggests that it

was the Belgians who categorised the Rwandans into three main ethnic groups.

45. The Prosecution maintains that all the authorities quoted indicate the early 30's as a reference and that such a sentence does not indicate that the Belgians created the separate ethnic groups. The Prosecutor alleges that the information is both common knowledge and an adjudicated fact.

6. In 1946, Rwanda became a Belgian trust territory under the United Nations.

7. The revolution of 1959 marked the beginning of a period of ethnic clashes between the Hutu and the Tutsi in Rwanda, causing hundreds of Tutsi to die and thousands more to flee the country in the years immediately following.

46. The Defence indicate that there were ethnic clashes in the past and that 1959 does not mark the beginning of conflicts even if it is a turning point. This information is therefore not neutral.

47. The Prosecution maintains that this paragraph does not purport that all ethnic conflict started in 1959 and should therefore not be considered as being a partial reflection of reality.

8. The revolution of 1959 led to the abolition of the monarchy, the removal of all Tutsi political and administrative structures and the establishment of the First Republic in 1961.

9. Legislative elections held in September 1961 confirmed the dominant position of the, essentially Hutu, MDR-PARMEHUTU (Mouvement Démocratique Républicain-Parti du Mouvement d'Emancipation Hutu), led by Grégoire Kayibanda, who was subsequently elected President of the Republic by the Legislative Assembly on 26 October 1961.

48. The Defence indicate that the date at which Kayibanda became President is controversial in view of the judgement references.

10. The MDR-PARMEHUTU was the only party to present candidates in the elections of 1965.

49. The Defence allege that none of the references supports this assertion, which cannot therefore be considered as a fact of common knowledge.

50. The Prosecution indicates that this is indeed a fact of common knowledge and adjudicated and supported by the Steering Committee reference omitted in their submissions.

11. The early part of 1973, the First Rwandan Republic, which was under the domination of the Hutu of central and southern Rwanda, was again marked by ethnic violence.

51. The Defence allege that this is not a true reflection of the historical reality of the time as this period was marked by rivalry between the Hutus from the north and the people from the central region who were in power.

52. The Prosecution cites *Akayesu* and *Kayishema and Ruzindana* Judgements in support of this fact but would be content if the Chamber substituted a suitable alternative wording.

12. The ethnic confrontations in 1973 prompted another mass exodus of the Tutsi

minority from the country, as had occurred between 1959 and 1963.

53. In light of the authorities cited, the Defence allege that the contention that a mass Tutsi exodus in 1973 similar to the one that allegedly occurred between 1959 and 1963, is unsupported.

54. The Prosecution indicates an omission to the Steering Committee as well as to the *Kayishema and Ruzindana* Judgement in support of this proposition. The Prosecution further maintains that it is ludicrous to suggest that the crises that led to the various exodi were caused by anything but ethnic confrontations.

13. Many exiled Tutsi made violent incursions back into Rwanda from neighbouring countries.

55. The Defence allege that this paragraph is controversial insofar as the references to both the time and the neighbouring countries, from where the exiled Tutsis allegedly staged violent incursions, are vague.

56. The Prosecution argues that there is no requirement in the Rules about the degree of specificity and that this information does not go to prove the guilt of the accused.

14. The word Inyenzi, meaning cockroach, came to be used to refer to Tutsi.

57. The Defence indicate that this allegation is not supported by most references particularly concerning the period of the late 1960s or early 1970s.

58. The Prosecution accepts that the term was initially used only to describe armed Tutsi groups making incursions from neighbouring countries but that the word came to be used to refer to all Tutsi and is an adjudicated fact

15. On 5 July 1973, General Juvénal Habyarimana seized power in a military coup.

59. The Defence indicate that the Chamber must hear further evidence to establish a complete and unbiased fact; otherwise, the burden of proof will shift if judicial notice is taken.

60. The Prosecution, quoting *Akayesu*, contests that this fact is incomplete and biased.

16. In 1975, Juvènal Habyarimana founded the Mouvement Révolutionnaire National pour le Développement (MRND).

17. Juvènal Habyarimana assumed the position of Chairman of the Mouvement Révolutionnaire National pour le Développement (MRND).

18. Every Rwandan was automatically a member of the MRND from birth.

19. From 1973 to 1994, the government of President Habyarimana used a system of ethnic and regional quotas which was supposed to provide educational and employment opportunities for all.

61. The Defence allege that none of the three references submitted supports such assertions, which are not common knowledge, and that the *Kayishema and Ruzindana* Judgement indicates that this

system was abolished in November 1990.

62. The Prosecution indicates that the proposition relating to the dates of the quota systems rely refers to the years that President Habyarimana was in power. The Prosecution does not object to the deletion of the date reference, if the Chamber so decides.

> *20. The quota system was in fact used increasingly to discriminate against both Tutsi and Hutu from regions outside the north-west of Rwanda.*

63. The Defence submit that none of the Prosecution's references supports such assertion.

64. The Prosecution refers to the commentary in support of facts19 and 20.

> *21. Among the privileged elite, an inner circle of relatives and close associates of President Habyarimana and his wife, Agathe Kanziga, known as the Akazu, enjoyed great power.*

65. The Defence allege that the references submitted do not refer to the wife of the President.

66. The Prosecution maintains that several cited books refer to the President's wife in the context of the Akazu.

> *22. Some Tutsi exiles formed a political organisation called the Rwandan Patriotic Front (RPF).*

67. The Defence state that it is incorrect to assert that "Tutsi exiles" formed the RPF and that this assertion is undermined by the Judgement references.

68. The Prosecutor has amended the words "the Tutsi exiles" by the phrase "some Tutsi exiles".

> *23. The RPF was a politico-military opposition organisation.*

69. The Defence argue that the first three references submitted to the Chamber (including *Akayesu, Kayishema & Ruzindana*) do not contain any suggestion that the RPF attack of October 1990 played a role in the introduction of the multiparty system and the adoption of a new constitution. Only the Steering Committee seems to make reference to this point.

70. The Prosecution alleges that the authorities cited establish that this is a fact of common knowledge.

> *24. The RPF's military wing was called the Rwandan Patriotic Army (RPA)*
>
> *25. On 1 October 1990, the Rwandan Patriotic Front (RPF) attacked Rwanda.*
>
> *26. Within days after the 1 October 1990 invasion of the RPF, government began arresting thousands of people.*
>
> *27. Tutsi and Hutu political opponents were the main target of the arrests following the RPF invasion of 1 October 1990.*

28. Following pressure from the internal opposition, the international community and the RPF attack of October 1990, President Habyarimana permitted the introduction of multiple political parties and the adoption of a new constitution on 10 June 1991.

29. The emergence of multipartyism resulted in the establishment of four political parties in Rwanda: the MRND (Mouvement Républicain National pour la Démocratie et le Développement), the MDR (Mouvement Démocratique Républicain), the PSD (Parti Social-Démocrate) and the PL (Parti Libéral).

71. The Defence assert that paragraph 29 is in dispute and that there were five established parties, the fifth being the *Parti Démocrate Chrétien* (PDC). The Defence further allege that, according to the expert Professor Guichaoua, the CDR was founded in March 1992. It is therefore a disputable fact.

72. The Prosecution deletes the reference to the CDR (Coalition pour la Défense de la République).

30. The first transitional government following the 1991 constitutional reforms was made up almost exclusively of MRND members, following the refusal of the main opposition parties to take part.

73. The Defence indicate that from the references given, the Chamber should infer that the main opposition parties expressed dissatisfaction because of the composition of the first transitional government.

74. As an alternative, the Prosecution consents to the deletion of the words "following the refusal of the main opposition parties to take part" should this reference not rise to the required level of common knowledge.

31. With the second transitional government formed in April 1992, the MRND became a minority party for the first time in its history, with nine (9) ministerial portfolios out of nineteen (19).

75. According to the Defence, the reference indicates that the real power remained in the hands of the President and his MRND representatives.

76. The Prosecution maintains that the second transitional government is a minority because it has fewer seats and this is not a comment on the de facto power that the party had.

32. Even in the second transitional government, the MRND retained its domination over local administration.

77. The Defence submit that this is a sweeping assertion that cannot be found in Akayesu or in Mr. Ndiaye's report.

78. The Prosecution submits that the proposition is of common knowledge to the reasonable person.

33. The new transitional government of 1992 then entered negotiations with the RPF, which resulted in the signing of the Arusha Accords on 4 August 1993.

34. Among other things, the Arusha Accords provided for the following:

(a) The integration of both the government's Forces Armées Rwandaises (FAR) and the RPF into the Rwandan National Army.

(b) The new national army was to be limited to 13,000 men, 60% FAR (Forces Armées Rwandaises) and 40% RPF

(c) The military command posts were to be shared equally (50%-50%) between the two sides, with the post of Chief of Staff of the Army assigned to the FAR.

(d) The Gendarmerie was to be limited to 6,000 men, 60% FAR and 40% RPF, with the posts of command shared equally (50%-50%) between the two sides and the post of Chief of Staff of the Gendarmerie assigned to the RPF.

(e) The Accords limited the number of ministerial portfolios to be held by the MRND (Mouvement républicain national pour le développement) to five, including the Presidency.

(f) The other portfolios within government were to be shared as follows: RPF (Front patriotique Rwandais), five; MDR (Mouvement démocratique républicain), four (including the post of Prime Minister); PSD (Parti social-démocrate), three; PL (Parti libéral), three; and the PDC (Parti démocrate-chrétien), one.

35. On 5 October 1993, the U.N. Security Council resolved to establish and deploy an international peace-keeping force in Rwanda named "United Nations Assistance Mission for Rwanda" (UNAMIR)

36. Determined to avoid the power sharing prescribed by the Arusha Accords, several prominent civilian and military figures pursued their strategy of ethnic division and incitement to violence.

79. The Defence allege that the indisputable fact that some prominent civilians and military figures had devised a strategy of ethnic division before the Arusha Accords has yet to be established and that the whole assertion is imprecise and reflects more an intent than a fact.

80. The Prosecution states that it is not under the obligation to specify the particulars and that the sole question is whether the information is an adjudicated fact or a fact of common knowledge worthy of judicial notice.

37. With the intention of ensuring widespread dissemination of the calls to ethnic violence, prominent figures, including some from the President's circle, set up hate media.

81. The Defence submit that the same objection apply to paragraphs 36 and 37 as the assertion is unclear and deals with intent.

82. The Prosecution maintains that the various sources cited confirm the above proposition.

38. The most prominent forms of hate media included Radio Télévision Libre des Mille Collines (RTLM) and the newspaper Kangura.

83. The Defence submit that the term "hate media" denotes an intent resulting from facts, whereas the characterisation in question is an important component of the trial of Nahimana, Ngeze and Barayagwiza before Trial chamber I. Trial Chamber II should be cautious of the *sub judice* rule.

84. The Prosecution considers that a statement like "RTLM is known as the 'killer radio station' from Degni-Ségui Report is clear evidence that intentional elements can amount to common knowledge within the jurisdiction of the tribunal

> *39. Several Political Parties established youth organisations.*

85. The Defence allege that this paragraph is vague and non-specific and therefore lacks objectivity.

86. The Prosecution maintains that there is no degree of specificity required and that paragraph 40 provides further elaboration.

> *40. Members of the Interahamwe (MRND youth wing) and the Impuzamugambi (CDR youth wing), were organised into militia groups.*

87. The Defence argue that this paragraph is not supported by the references submitted by the Prosecutor and that, to ensure the trial's fairness, such allegations necessarily involve individuals who could be called to testify as to the Accused's involvement or non involvement therein.

88. Following the Defence's remarks, the Prosecution suppressed certain references to financing in the original Annex A.

Conclusions by the Chamber on Points 1 to 40 of Annex A

89. As to the facts laying out the "historical background" in Annex A, the Chamber notes that some of these facts form part of the historical context of each of the Amended Indictments against the Accused jointly tried in the present trial, whereas some facts do not form part of such context.

90. The Chamber finds that the Prosecution has failed to demonstrate that those background facts referring to events prior to 1959 which are not referred to in the Indictments against the Accused, are relevant to the present proceedings. Accordingly, the Chamber will not take judicial notice of items 1 to 6, as they refer to events prior to 1959, which is the earliest date mentioned in the Indictments against the Accused.

91. As to the historical facts contained in items 7 to 40, the Chamber notes that the Defence allege that those facts are, *inter alia*, imprecise as to the dates, lack the required neutrality to render them reasonably indisputable, or otherwise are unsupported by prior judgements.

92. The Chamber finds that these "historical facts" are not facts of common knowledge pursuant to Rule 94 (A) of the Rules, and that the Chamber might therefore only take judicial notice of them, pursuant to Rule 94 (B) of the Rules, if they are indeed adjudicated facts and relate to the present proceedings. The Chamber is of the opinion that, for these facts to be admitted as forming part of the proceedings after having been judicially noticed, the Prosecution should have demonstrated their relevancy. Moreover, the Prosecution relies on various authorities and/or judgements that, more often than not, support only approximately the facts recited therein.

93. For the above reasons, the Chamber decides not to take judicial notice of items 7 to 40 in Annex

A.

Political facts

Ethnicity

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

Death of Habyarimana

42. On 6 April 1994, the President of the Republic of Rwanda, Juvénal Habyarimana, was killed when his plane was shot down on its approach to Kigali airport.

Systematic Assasinations

43. From the morning of 7 April 1994, groups of military personnel commenced the systematic assassinations of a large number of individuals, including:

(a) The then Prime Minister, Ms. Agathe Uwilingiyimana.

(b) Some of the Ministers in the Government of Prime Minister Uwilingiyimana.

(c) Cour de Cassation (ie Constitutional Court) President Joseph Kavaruganda.

(d) The Belgian UNAMIR soldiers sent to protect the Prime Minister.

94. The Defence submit that paragraph 43 is too vague and is open to interpretation and challenge because of the use of the terms "groups of military personnel" and "systematic assassinations of a large number of political opponents" (which was subsequently amended by the Prosecution to "individuals,") including "(d) the Belgian UNAMIR soldiers [...]" who would then be identified as political opponents. The Defence consider that this is not a notorious fact and that the whole paragraph lacks neutrality.

95. The Prosecution regrets the expression "political opponent", which was deleted in the Amended Annex A, and alleges that there is no issue of neutrality.

44. The massacre of the Belgian soldiers prompted the withdrawal of the Belgian troops in the days that followed.

45. After the withdrawal of the Belgian troops, the UN Security Council drastically reduced the number of UNAMIR personnel in Rwanda.

96. The Defence contest the fact that the Chamber should take judicial notice of a value judgement in characterising the reduction as "drastic", which is not the position in Akayesu.

97. Based on the authorities cited, the Prosecution alleges that the objections lack substance.

Interim Government

46. Given the political and constitutional void created by the deaths of most national political authorities a new government, the "Interim Government", composed solely of Hutu was set up on 9 April 1994.

98. The Defence argue that this paragraph suggests that the policy of the "interim government" was determined by its Hutu make up and associates all Hutu with the said interim government. The paragraph is worded with an ethnical connotation, which contradicts the reconciliation mission of the Tribunal. Moreover, assimilating the Hutu, without distinction, with the Interim Government is prejudicial to the Accused.

99. The Prosecution contests that this paragraph leads to the conclusion that all Hutu were involved with or supported the interim government.

47. Jean Kambanda was appointed Prime Minister of the Interim Government that was officially sworn in on 9 April 1994.

48. In the Interim Government, the MRND held nine ministerial posts, plus the Presidency of the Republic, while the remaining eleven (11) positions, including that of Prime Minister, went to then 'Power' factions of the other parties.

100. The Defence indicate that this paragraph appears to contradict the reference submitted, which indicates that the MRND was not a minority party in the Interim Government.

49. During the week of 14 to 21 April 1994, the President of the Interim Government, the Prime Minister and some key ministers travelled to Butare and Gikongoro.

101. The Defence indicate that it is impossible for the Tribunal to take judicial notice of such a statement and that no other Chamber has ruled on identical facts. There is a lack of consensus among the authorities quoted so it cannot be a fact of common knowledge.

50. On 19 April 1994, the President of the Interim Government, Theodore Sindikubwabo, spoke on the radio and called for the killing of "accomplices" in Butare.

102. The Defence indicate that this paragraph, like the preceding paragraph 49, states a fact which is not of common knowledge: neither *Kayishema & Ruzindana* Judgement, nor Degni-Segui, nor the Steering-1, nor Prunier supports the alleged fact that the President gave a speech on 19 April 1994. This allegation is important since it is linked to the offence with which Kanyabashi is charged in paragraph 5.8 of the indictment regarding whether or not such a speech was broadcast in Butare.

51. The visits of the President of the Interim Government, the Prime Minister and some key ministers to Butare and Gikongoro during the week of 14 to 21 April 1994, marked the beginning of killings in the regions.

103. The Defence submit that only the *Akayesu* decision at paragraph 110 supports this statement, whereas Mr Degni-Segui refers to Butare and Cyangugu as the regions where the massacres started towards 20 April, and the *Kayishema & Ruzindana* Judgement refer to the President's presence and his speech of 19 April 1994 in Butare, which allegedly triggered the massacres. Accordingly, there is uncertainty as to the prefectures in question and as to whom, if anyone, accompanied the President.

104. For paragraphs 49, 50 and 51, the Prosecution maintains that common knowledge can be

determined by synthesising matters from several sources. The Prosecution alleges that the President's speech does not go to prove an element of any crime or the guilt of an accused but only represent a background.

Conclusions by the Chamber Regarding Items 41 to 51 of Annex A

105. The Chamber finds that items 41 and 42 of Annex A are not disputed facts and amount to facts of common knowledge for which the Chamber shall take judicial notice, pursuant to Rule 94 (A).

106. Having considered the Defence submissions as to the disputability of items 43 to 51 of Annex A and the lack of common knowledge thereof, the Chamber decides that such facts cannot be reasonably assessed as common knowledge under Rule 94(A) and cannot be considered as adjudicated facts under Rule 94 (B).

107. For the above reasons, the Chamber will not take judicial notice of items 43 to 51 of Annex A.

Widespread or systematic violence

> *52. The following state of affairs, among others, prevailed in Rwanda between 1 January 1994 and 17 July 1994:*
>
> > *(a) There were throughout Rwanda widespread or systematic attacks against human beings.*
> >
> > *(b) The widespread or systematic attacks were directed against a civilian population.*
> >
> > *(c) The widespread or systematic attacks were directed against a civilian population on the grounds of political persuasion, Tutsi ethnic identification or Tutsi racial origin.*

108. The Defence question the alleged fact that the period ends on 17 July 1994, and not 31 December 1994. However, it is to be noted that the "Semanza Decision of 3 November 2000" accepted that such state of affair existed between 6 April and 17 July 1994. The Defence alleges that acts of violence were also committed after the genocide. It would be misleading to take judicial notice of the fact that violence ended after 17 July 1994.

109. The Prosecution maintains that the Chamber is free to take judicial notice of selective facts that are relevant to the Butare cases and does not allege that the events occurring after 17 July 1994 are generally unimportant. Rather, the Prosecution submits that they are not relevant to the present case.

> *53. As part of the extermination efforts, census lists and other lists of people to be killed were made.*
>
> *54. Between 1 January 1994 and 17 July 1994, soldiers, militiamen and civilians under orders set up roadblocks.*

110. The Defence allege that the facts contained in the paragraphs 53 and 54 are directly linked to the charges and are of the same nature as those of which Trial Chamber III declined to take judicial notice because they are not reasonably indisputable. The Defence argue that the Prosecutor is trying to admit

into evidence the planning of crimes, whereas the assertion that the census lists were aimed at identifying people to be killed is not a matter of common knowledge.

111. The Prosecution maintains that the fact that census lists were made and roadblocks established generally does not go to prove the guilt of any Accused. The existence of any *mens rea* in the commission of the acts listed in 53 and 54 is general and does not implicate any accused in the Butare cases. The large-scale devastation caused at roadblocks in Rwanda in 1994 and the wide distribution of extermination lists are facts of public notoriety.

55. At those roadblocks, the identity cards of anyone wishing to pass were often checked.

56. Many people identified as Tutsi were killed by those manning the roadblocks.

112. The Defence allege that the alleged facts set out in paragraphs 55 and 56 are directly related to the charges and that they supplement the disputable assertions in paragraph 53 and 54.

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

113. The Defence refer to their earlier commentary concerning the period during which people died in Rwanda because of generalised violence.

114. The Prosecution reiterates that the argument regarding the time limit set out in the paragraph is unfounded.

Conclusions by the Chamber Regarding Items 52 to 57 of Annex A

115. The Chamber does not find that the facts enumerated in paragraphs 52 to 57 constitute facts of common knowledge. Even if previous judgements rendered by this Tribunal may provide some support for the events recited, generalisations on "widespread or systematic attacks" against a "civilian population", "census lists", "roadblocks" or the number of people killed between 1 January 1994 and 17 July 1994 in Rwandan are elements specifically disputed by the Defence. The Chamber is of the opinion that these statements need to be proved by the Prosecution and will not be considered as adjudicated facts relevant to the present proceedings.

116. For the above reasons, the Chamber does not take judicial notice of items 52 to 57 of Annex A.

Administrative structures

58. During the events referred to in the indictments, Rwanda consisted of the following administrative structures:

(a) Eleven (11) préfectures: Butare, Byumba, Cyangugu, Gikongoro, Gisenyi, Gitarama, Kibungo, Kibuye, Kigali-Ville, Kigali-Rural and Ruhengeri.

(b) Each préfecture was subdivided into communes.

(c) Each commune was subdivided into secteurs.

(d) Each secteur was subdivided into cellules.

59. During the events referred to in the indictments, Butare préfecture was divided into 20 communes: Nyakizu, Kigembe, Gishamvu, Ngoma, Runyinya, Maraba, Ruhashya, Mbazi, Shyanda, Muyaga, Mugusa, Nyaruhengeri, Ndora, Muganza, Kibayi, Rusatira, Nyabisindu, Ntyazo, Muyira and Huye.

60. The Préfet represents executive power at prefectural level.

61. The Préfet is appointed by the President of the Republic on the recommendation of the Minister of the Interior and carries out his duties under that Minister's hierarchical authority.

62. The Préfet's authority covers the entire préfecture.

63. In his capacity as administrator of the préfecture, the Préfet is responsible for ensuring peace, public order and the safety of people and property.

64. The Préfet, in the discharge of his policing duties, maintaining peace and public order, may request the intervention of the army and of the Gendarmerie Nationale.

65. The Préfet has hierarchical authority over all civil servants and all persons holding public office within the boundaries of the préfecture, including the bourgmestres and conseillers de secteur.

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

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

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

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

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

(e) Traditionally, the role of the bourgmestre had always been to act as the representative of the President in the commune.

67. The arrival of multi-party politics did not particularly change the considerable amount of unoffical powers conferred upon the bourgmestre by the people in the commune.

68. The Bourgmestre is under the hierarchical authority of the Préfet.

117. Most Defence Counsel raise no objection to the Chamber taking judicial notice of the contents of the laws, legislative decrees and presidential orders listed in Appendix B as well as the Security Council resolution, as in the Semanza Decision. However, the Defence oppose the Chamber's taking judicial notice of the application or the judicial interpretation of the administration of local government as indicated in paragraphs 58 to 68 of Section III. The Defence remind the Chamber that the Prosecution

has filed an expert report by Professor Guichaoua titled "L'administraion territoriale rwandaise" addressing the same issues. The Defence had already indicated their willingness to cross-examine the said expert. Moreover, the Defence state that the administration of local government is a complex issue, which requires further clarification.

69. The Forces Armées Rwandaises (FAR) were composed of the Armée Rwandaise (AR) and the Gendarmerie Nationale (GN)

70. The Forces Armées Rwandaises did not have a unified command and came directly under the Minister of Defence.

71. The Commander-in-Chief of the Forces Armées Rwandaises was the President of the Republic.

72. The Gendarmerie Nationale was responsible for maintaining public order and peace and the observance of the laws in effect in the country.

73. Gendarmerie Nationale was under the Minister of Defence but could carry out its duties of ensuring public order and peace at the request of the Préfet.

74. In cases of emergency, this request could be made verbally, notably by telephone.

118. For paragraphs 69 to 74, the Defence refer the Chamber to their preceding commentary as to the difficulty of taking judicial notice of matters by relying almost exclusively on the content of Statutes, without being aware of the application and interpretation thereof. Specifically, the Defence indicate that the *Kayishema & Ruzindana* Judgement at paragraph 485 does not support paragraph 74 regarding the Prefect's power of oral requisition.

119. The Prosecution maintains that paragraph 67 is a verbatim reproduction of a finding in *Akayesu*, who was himself a *bourgmestre*. Further, it will be for the Prosecution to demonstrate the particular *de facto* powers of each accused before establishing how those powers are relevant to the crimes charged in the indictment.

120. The Prosecution maintains that the propositions listed in paragraphs 69 to 74 are supported by both legislation and judicial findings and the Defence has not demonstrated that these propositions are not of common knowledge.

Conclusions by the Chamber Regarding Items 58 to 74 (Part III) of Annex A

121. The Chamber notes that the legal authorities in support of the "statement of facts" on the interpretation of the functioning of the administrative structures are the documents listed in Annex B. The Chamber decides that it is not appropriate to take judicial notice of the interpretation of the application of such laws, as suggested by the Prosecution pursuant to Rule 94 (A). Accordingly, the Chamber does not take judicial notice of items 58 to 74 of Part III of Annex A.

Legal Findings

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

*(a) some Rwandan citizens committed **genocide**—to wit, the following acts were done with the intent to destroy wholly or partially in Rwanda the ethnic group identified as Tutsi:*

(i) persons perceived to be Tutsi were killed.

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

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

*(b) some Rwandan citizens directly and publicly **incited** others to commit **genocide**.*

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

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

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

*(f) some Rwandan citizens committed **rape** as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.*

*(g) some Rwandan citizens committed **political persecution** as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.*

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

76. Many of the victims of the abovementioned crimes were protected persons, within the meaning of Article 3 common to the Geneva Conventions and Additional Protocol II.

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

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

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

(b) this armed conflict was non-international in character.

79. Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) - having acceded to it on 16 April 1975.

80. Between 1 January 1994 and 17 July 1994, Rwanda was a Contracting Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977 - having succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and acceded to Protocols additional thereto of 8 June 1977 on 19 November 1984.

122. The Defence indicate that paragraphs 75 to 80 appear under the title "Legal conclusions", which clearly indicates that the Chamber must not take judicial notice of legal findings and intentions, but only of objective facts. It cannot be used to judicially notice the crime of genocide by specifying the specific intent as in paragraph 75 (a). The Defence also recall paragraph 36 of the "Semanza Decision of 3 November 2000" on the issue of whether "genocide" occurred in Rwanda, which states: "[T]he question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime".

123. The Defence rely on the final reports of the Commission of Experts established by the Security Council, which states at paragraphs 181 and 182 that "individuals from both sides to the armed conflict perpetrated crimes against humanity in Rwanda" during the period from 6 April 1994 to 15 July 1994. It is therefore suggested that it is incorrect to infer that murders, extermination of the civilian population and other crimes stopped on 17 July 1994 or that these crimes did not exist prior to 6 April 1994.

124. The Prosecution wishes to correct an error in date and amends the date of the accession of Rwanda to the Genocide Convention from 12 February 1975 in the original Motion to 16 April 1975. With regard to Rwanda's accession to the Genocide Convention, as mentioned in paragraph 79, the Defence indicate that United Nations references refer to 6 April 1975 as the relevant date and not 16 April 1975, as alleged by the Prosecution.

125. With regard to paragraphs 75 to 80, the Prosecution maintains that only paragraph 75 contains *mens rea* elements but that these crimes are of common knowledge and constitute adjudicated facts before this Tribunal. The Prosecutor further argues that facts listed at 76 to 80 are consistent with all previous jurisprudence and that the exact wording of 78, 79 and 80 were first judicially noticed in the first Semanza Decision.

126. Even if the ICTY Simic Decision quoted by the Defence prohibits judicial notice of "legal characterisation of the conflict", the Prosecution maintains that those concerns are not applicable in the Rwandan context since there is no precedent before this Tribunal to suggest that "different conflicts of different natures" occurred in Rwanda. The Prosecution further indicates that the Semanza Decision took judicial notice of the nature of the conflict in Rwanda.

Conclusions by the Chamber Regarding Items 75 to 80 of Annex A

127. Having noted that Defence Counsel have contested the judicial notice with regard to the nature of the conflict in Rwanda during the relevant period and concurring with the reasoning in the

Ntakirutimana Decision of 22 November 2001, the Trial Chamber decides that, even if there are previous judgements referring to the nature of the conflict in Rwanda, and to crimes committed therein, the Chamber "prefers in the circumstances of the present case to hear evidence and arguments on the issue, rather than to take judicial notice"[17] of those legal conclusions.

128. The Chamber, therefore, does not take judicial notice of facts 75 to 80 of Annex A.

129. Finally, and also concurring with a finding in the Ntakirutimana Decision of 22 November 2001, the Chamber does not consider it to be its task to reformulate the facts listed in Annex A.

JUDICIAL NOTICE OF ANNEX B

130. In the present case the Prosecutor argues that the documents in Annex B ought to receive not only judicial notice of their authenticity but of their contents as well. In support of its argument, the Prosecution relies on the Semanza Decision of 3 November 2000[18]:

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

131. The Prosecutor, citing a Decision in the ICTY Simic case argues that the test for the judicial notice of the contents of documents ought to be whether the documents amount to a "readily accessible source of indispensable accuracy".[19]

132. The Defence do not object to judicial notice of Annex B, which is mainly composed of legislation, but submit that the content of such legislation is no evidence of its application.

133. The Chamber finds that the Laws of Rwanda (*Décrets-loi*, items 1 and 4), certain parts of the Rwandan Law from "*Codes et lois du Rwanda*" (items 2, 3, and 5), the *Arrêtés présidentiels* (items 6 and 7) and the Constitution of the Republic of Rwanda (item 9, added by Addendum) are proper subjects for judicial notice, pursuant to Rule 94 (A), as they are matters of public notoriety that should not normally require proof. The Chamber notes that, in the Semanza Decision of 3 November 2000, the Chamber judicially noticed documents by the United Nations Security Council similar to item 8 of Annex B. Accordingly, the Chamber takes judicial notice of the existence and authenticity of the documents listed in Annex B, but does not take judicial notice of the facts recited therein.

134. The Chamber concurs with the ruling of Trial Chamber III in the Semanza Decision of 6 February 2002, in which "in the interest of completeness and accuracy" the Chamber *proprio motu* took judicial notice of *Décret-loi No 18/75* that modified *Décret-loi No 10/75*. In the instant case, having noted the Defence's submissions in this respect, the Chamber *proprio motu* takes judicial notice of the legislation in Annex B and of any subsequent modification or amendments made to it, up until 31 December 1994.

ADMISSION INTO EVIDENCE OF ANNEX C

135. The Defence allege that the Prosecution's request in relation to Annex C pursuant to Rule 89(C),

raises important issues such as: the exemption from the rule of law, the admissibility of irrelevant evidence and the violation of the right of the accused to a fair trial through an improper shift of the burden of proof.

136. The Defence argue that an informal document, the contents of which cannot be judicially noticed, must be tendered in evidence by its author, unless the opposing party consents thereto, which is not the case. The Defence argue that rules governing the admissibility of evidence require, *inter alia*, that such evidence be reliable, relate to specific facts and be relevant, whereas the Prosecutor simply alleges that the documents contained in Annex C have probative value.

137. Concerning the admission into evidence of the book titled "The United Nations and Rwanda 1993-1996" (paragraph 5 of Annex C), the Defence indicate that questions of relevance can be raised in relation to information contained in the book and that opinions and conclusions comprised in the book cannot be admitted into evidence unless made by an expert witness, pursuant to Rule 94*bis*.

138. Finally, the Defence argue that to admit into evidence disputed facts of questionable relevance would amount to compelling the Accused to adduce evidence in rebuttal of such facts without knowing what probative value these documents may have. Only the Constitution of Rwanda, referred to in paragraph 10 of Annex C, should be treated like other documents present in Annex B.

139. The Prosecutor argues that Annex C consists of documents with probative value, as recognised in both the Semanza Decision and the *Akayesu* Judgement, where the vast majority of the documents were judicially noticed as to their authenticity because of their probative value regarding the historical and political context of the offences with which the accused was charged.

140. The Chamber finds that in order to "best favour a fair determination of the matter before it" (sub-Rule (B)), the Parties should, as a matter of principle, have an opportunity to examine the evidence presented by the opposing Party in the course of the proceedings, following the scheme for the admission and presentation of evidence established by the Rules[20]. Rule 89(C) states that "a Chamber may admit any relevant evidence which it deems to have probative value". However, the Chamber is not convinced that justice will be best served if, in the instant case by the exercise of its discretionary power, it admitted into evidence the documents listed in Annex C, insofar as their relevancy and probative value have not been demonstrated by the Prosecution. (Our emphasis).

141. Accordingly, the Chamber denies the request to admit into evidence the documents listed in Annex C, pursuant to Rule 89(C) of the Rules.

142. Finally, the Chamber concurs with the remarks of Trial Chamber I in the Ntakirutimana Decision concerning facts which were not judicially noticed in the instant proceedings but which could possibly be judicially noticed in a different context; the Chamber does not take judicial notice of the aforementioned facts in the specific context of the "Butare Cases" involving six accused jointly tried.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Defence "Motion by the Accused Pauline Nyiramasuhuko and Élie Ndayambaje to Rule Inadmissible the Prosecution Motion for Judicial Notice and Admission of Evidence."

DENIES the Defence « Requête d'extrême urgence sollicitant l'autorisation de déposer une duplique à la réplique du Procureur à la réponse de Pauline Nyiramasuhuko à la requête aux fins de constat judiciaire et d'admission de présomptions factuelles, aux vues d'éléments nouveaux n'apparaissant pas

dans la requête initiale du procureur », filed on 12 September 2001.

DENIES the Prosecution's Motion to Rule Inadmissible Nsabimana's Reply;

TAKES JUDICIAL NOTICE of items 41 and 42 contained in Annex A, as facts of common knowledge, pursuant to Rule 94(A).

TAKES JUDICIAL NOTICE of the authenticity of the documents contained in Annex B to the Motion, pursuant to Rule 94(A), including any subsequent modification or amendments up until 31 December 1994, as follows:

(1) *Décret-loi* No. 10/75, *Organisation et fonctionnement de la préfecture, 11 mars 1975*;

(2) *Organisation territoriale de la République, 15 avril 1963, annexe II, limites des communes*, at paragraph III;

(3) *Loi sur l'organisation communale, 23 novembre 1963, article 1*;

(4) *Décret-loi création de la Gendarmerie nationale (23 janvier 1974)*;

(5) *Ordonnance législative No. R/85/25, Création de l'Armée rwandaise (10 mai 1962, article 4);*

(6) *Arrêté présidentiel No. 86/08, Intégration de la Police dans l'Armée rwandaise (26 juin 1973, articles 1, 2);*

(7) *Arrêté présidentiel No. 01/02, Statut des officiers des forces armées rwandaises (3 janvier 1977, article 2);*

(8) UN Document S/RES/872 (1993) 5 October 1993 ;

(9) The Constitution of the Republic of Rwanda, 10 June 1991, Art. 45 (*Gazette,* 1991, p. 615).

DENIES the Motion in all other respects.

Arusha, 15 May 2002,

William H. Sekule	Winston C. Matanzima Maqutu	Arlette Ramaroson
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

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[1] Unofficial translation of the title of the Submission "Urgent Motion Requesting Additional Time to Reply to the

Prosecutor's Motion for Judicial Notice."

[2] Unofficial translation of the title of the Submission "Motion by Joseph Kanyabashi Requesting Authorisation to File a Reply to the Prosecutor's Response on the Motion for Judicial Notice and Admission of Evidence."

[3] Unofficial translation of the Submissions "Preliminary Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence", "First Supplements to the Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence".

[4] Unofficial translation of the submission "Pauline Nyiramasuhuko's Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence".

[5] Unofficial translation of the submission "Extremely Urgent Motion for Authorisation to File a Reply to the Prosecutor's Response to Pauline Nyiramasuhuko's Reply to the Motion for Judicial Notice and Admission of Evidence in View of New Facts" and "Reply by Pauline Nyiramasuhuko to Prosecutor's Response to Pauline Nyiramasuhuko's Reply to the Motion for Judicial Notice and Admission of Evidence".

[6] Unofficial translation of the submission "Extremely Urgent Motion to Hear the Parties on Judicial Notice and Admission of Evidence".

[7] Unofficial translation of the Submission "Response of the Accused Alphonse Nteziryayo to the Prosecutor's Motion for Judicial Notice and Admission of Evidence."

[8] Unofficial translation of the Submission "Reply to the Prosecutor's Supplemental Reply in Support of the Motion for Judicial Notice and Admission of Evidence Only on the Issue of Deadlines."

[9] Unofficial translation of the submission "First Supplements to the Response to the Prosecutor's Motion for Judicial Notice and Admission of Evidence."

[10] See "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", the Prosecutor v. Sikirica et al., Case No. ICTY-IT-95-87, 27 September 2000,

[11] "Semanza Decision of 3 November 2000", at paragraph 23.

[12] *Id.* at para. 24.

[13] *Id.* at par. 31.

[14] *Id.* at para. 35.

[15] Pursuant to Rule 94, the Chamber in the "Semanza Decision of 3 November 2000"decided as follows: "Some of the facts the Prosecutor seeks judicial notice of in Appendix A belong to that genus of 'common knowledge' or "notorious historical facts" permitting a court to dispense with the submission of formal proofs. For example, the Prosecutor first calls on the Chamber to take judicial notice of the fact that Rwandan citizens were classified into three ethnic groups, namely, Hutu, Tutsi and Twa. Similarly, the fact that during the period from 6 April 1994 to 17 July 1994 there existed throughout Rwanda 'widespread and systematic attacks' against the civilian population based on certain invidious classifications including Tutsi ethnic identity, is a notorious historical fact of which this Chamber may take judicial notice. Moreover, the powers of the office of *Bourgmestre* are a proper subject of judicial notice because it falls squarely into the category of matters that are of common knowledge within the jurisdiction of this Tribunal and which may readily be determined by reference to such reliable sources such as the written laws of Rwanda."

[16]Appeals Chamber Decision, Prosecutor v. Kupreskic, 8 May 2001.

[17] Ntakirutimana, para. 36

[18] Semanza at para. 38.

[19] "Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina", the Prosecutor v. Simic et al, Case No. ICTY-IT-95-9-PT, 25 March 1999, at par. 3.

[20] "Decision on Prosecutor's Appeal on Admissibility of Evidence, Dissenting Opinion of Judge Patrick Robinson", the Prosecutor v. Aleksovski, Case No-ICTY- IT-95-14/1-AR73, 16 February 1999, par.5.

ANNEX 5

Prosecutor v Akayesu, ICTR-96-4-T, Judgment, 2 Sept. 1998 paras 157, 164 and 627.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

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5. FACTUAL FINDINGS

5.1. General allegations (Paragraphs 5-11 of the Indictment)

Events Alleged

157. Paragraphs 5 to 11 of the indictment appear under the heading, "General Allegations". These general allegations are, for the most part, mixed questions of fact and law relating to the general elements of genocide, crimes against humanity, and violations of international humanitarian law, the crimes set forth in Articles 2, 3 and 4 of the Statute of the Tribunal, under which the Accused is charged. Several witnesses testified before the Chamber with regard to historical background and the general situation in Rwanda prior to and during 1994. The Chamber has substantially relied on the testimonies of Dr. Ronie Zachariah, Ms. Lindsey Hilson, Mr. Simon Cox, Dr. Alison Desforges, who testified as an expert witness, and General Romeo Dallaire, the force commander of UNAMIR at the time of these events as well as United Nations reports of which it takes judicial notice, for its general findings on the factual allegations set forth in paragraphs 5-11 of the indictment.

158. Dr. Zachariah, the Chief Medical and Field Coordinator for Medecins sans frontieres ("MSF"), based in the Butare region, testified that he witnessed widespread massacres of civilians in Rwanda from 13 to 24 April 1994. He stated that he travelled from Butare to Gitarama on 13 April 1994 in order to provide medical supplies to a hospital in Gitarama which had received 40 to 50 injured people. From 25 kilometres outside Gitarama, Dr. Zachariah said he and his team began to see refugees on the road, who reported the killings of civilians at roadblocks. At one of these barriers, Dr. Zachariah stated that his driver was treated aggressively by a guard manning the roadblock, because the driver was Tutsi and the Tutsi were accused of helping the RPF. Dr. Zachariah testified that it soon became apparent upon arrival at Gitarama Hospital that Tutsi civilians were being targeted for attack on a massive scale. Subsequently, Dr. Zachariah witnessed attacks on civilian populations, and killings of civilians. He recounted visiting Kibeho Church on 16 April 1994, where two to four thousand Tutsi civilians were apparently killed, and Butare on 17 April 1994, where a Burundian Tutsi was apparently beaten to death at a checkpoint, and where his purchase officer reported seeing the bodies of 5-10 dead civilians at every checkpoint on the road from Kigali. These checkpoints were apparently manned by well-armed, drunken soldiers and civilians. On the road from Butare to Burundi on 19 April 1994, Dr. Zachariah sated that saw civilians being massacred in villages throughout the countryside and at roadblocks. In his words:

> "All the way through we could see on the [...] hillside, where there were communities, people [...] being pulled out by people with machetes, and we could see piles of bodies. In fact the entire landscape was becoming spotted with corpses, with bodies, all the way from there until almost Burundi's border".
>
> (Hearing of 16 January 1997, pp 98-99)

159. At the Rwanda-Burundi border, on the same day, Dr. Zachariah testified that he saw a group of 60 to 80 civilians fleeing towards the Burundian border, from men armed with machetes. He stated that most of these civilians were hacked to death before they reached the border. Returning from the Burundian border, on 21 April 1994, Dr Zachariah stated that he had spoken to eye-witnesses who had informed him of the killings of approximately 40 Tutsi MSF personnel, in the Saga camps in Butare. He stated that his driver's entire family had been killed on the outskirts of Butare by *Interahamwe* and he had been informed of these killings by his driver who had managed to escape death. Dr. Zachariah testified that he had witnessed, on 22 April 1994, the aftermath of the massacre of the family of a moderate Hutu, Mr. Souphene, the sub-Prefect of Butare, by the Presidential Guard, and, on the same

day, the killings of children in the Hotel Pascal in Butare and the executions of tens of Tutsi patients and nurses in Butare Hospital, including a Hutu nurse who was pregnant by a Tutsi man and whose child would therefore be Tutsi. Dr. Zachariah stated that he then decided to evacuate his team from Rwanda and he arrived at the Burundian border on 24 April 1994. On the way to the border and at the border, he stated that he had crossed streams and rivers in which the mutilated corpses of men, women and children floated by at an estimated rate of five bodies every minute. Dr. Zachariah stated under cross-examination that in his opinion the attacks were both "organised and systematic".

160. Lindsey Hilson, a journalist, testified that she was in Kigali from 7 February 1994 to mid-April 1994. Following the aeroplane crash of 6 April 1994 in which the Presidents of Rwanda and Burundi were killed, she said she heard from others and saw for herself the ensuing killings of Tutsi in the capital. On the third day after the aeroplane crash, she toured Kigali with aid workers and saw victims suffering from machete and gunshot wounds. In Kigali central hospital, where she described the situation as "absolutely terrible", wounded men, women and children of all ages were packed into the wards, and hospital gutters were "running red with blood". At the morgue she saw "a big pile like a mountain of bodies outside and these were bodies with slash wounds, with heads smashed in, many of them naked, men and women". She estimated that the pile outside the morgue contained about five hundred bodies, with more bodies being brought in all the time by pickup trucks. She stated that she also saw teams of convicts around Kigali collecting bodies in the backs of trucks for mass burial, as well as groups of armed men roaming the city with machetes, clubs and sticks.

161. Simon Cox, a cameraman and photographer, testified that he was on an assignment in Rwanda during the time of the events set forth in the indictment. He said he entered Rwanda from Uganda, arriving in the border town of Mulindi, in the third week of April 1994. Thence he headed south with an RPF escort and found evidence of massacres of civilian men, women and children, whom it appeared from their identity cards were mostly Tutsi, in church compounds. En route to Rusumo, in the south-east of the country, he visited hospitals where Tutsi civilians suffering from machete wounds were being treated, some of whom he interviewed. At the Tanzanian border, near Rusumo, by the Kagera river which flows towards Lake Victoria, Mr. Cox saw and filmed corpses floating by at the rate of several corpses per minute. Later, at the beginning of May, he was in Kigali and saw more bodies of dead civilians on the roads. The Chamber viewed film footage taken by Mr. Cox.

162. On a second trip, in June 1994, Mr. Cox visited the western part of Rwanda, arriving in Cyangugu from Zaire (now the Democratic Republic of Congo) and travelling north towards Kibuye. On that journey, he visited orphanages populated by Tutsi children whose parents had been massacred or disappeared. He visited a church in Shangi where a Priest described how the whole of his congregation who had been Tutsi had been hiding inside the church, because they had heard disturbances, and they were eventually all killed by large armed gangs of people, some of whom were equipped with hand grenades. The church had previously survived five repeated attacks. Mr. Cox himself examined the church and outbuildings and found graves, much blood and other evidence of killings. On the way to Kibuye, he saw further evidence of freshly dug mass graves in churchyards. Later, in the hills of Bisesero, he saw some 800 Tutsi civilians "in a desperate, desperate state", many apparently starving and with severe machete and bullet wounds, and with a great many corpses strewn all over the hills.

163. The testimony of an expert witness, Alison Desforges, which has been referred to and summarised above in the "Context of the conflict" section, also indicates that Tutsi and so-called moderate Hutu civilians were targeted for attacks on a massive scale in Rwanda at the time of the events which are the subject of this indictment.

164. In addition, the Chamber heard the testimony of General Romeo Dallaire, who was the force commander of UNAMIR in April 1994. General Dallaire described before the Chamber the massacres

of civilian Tutsi which took place in Rwanda in 1994. He also testified in relation to the armed conflict which took place between the RPF and the FAR at the same time as the massacres. This conflict appeared to be a civil war between two well-organised armies. In this context, General Dallaire referred to the FAR and the RPF as "two armies", "two belligerents" or "two sides to the conflict." He noted that the mandate of the UNAMIR was to assist these two parties in implementing the Arusha Peace Accords which were signed on 4 October 1993. Subsequently, other military agreements were signed between the parties, including cease-fire agreements and agreements for arms-free zones. General Dallaire testified that the FAR was under the control of the government of Rwanda and that the RPF was under the control of Paul Kagame. The FAR and RPF occupied different sides of a clearly demarcated demilitarised zone, and according to General Dallaire, the RPF comprised 12,000-13,000 soldiers deployed in three groups: two groups for reaction in the western flank of the demilitarised zone and another group in the eastern flank with six independent battalions. The RPF headquartered in Mulundi, and had a lightweight battalion stationed in Kigali. General Dallaire testified that the RPF troops were disciplined and possessed a well-structured leadership which was answerable to authority and which respected instruction.

165. In addition to the testimony of these witnesses, the Chamber takes judicial notice of the following United Nations reports, which extensively document the massacres which took place in Rwanda in 1994: notably, the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994); *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993*, U.N. Doc. E/CN.4/1994/7/Add.1 (1993); *Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda,* S/1994/470, 20 April 1994; *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994,* U.N. Doc. E/CN.4/S-3/3 (1994). See also, generally, the collection of United Nations documents in *The United Nations and Rwanda, 1993-1996,* The United Nations Blue Books Series, Volume X, Department of Public Information, United Nations, New York.

166. The Chamber notes that witnesses from Taba also attested to the mass killings which took place around the country.

Additional Protocol II

622. As stated above, Additional Protocol II applies to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

623. Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

> (i) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
>
> (ii) the dissident armed forces or other organized armed groups were under responsible command;
>
> (iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
>
> (iv) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

624. As per Common Article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the Chamber making a finding thereon.168

625. The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.

626. The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.

627. In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment169. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has

been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law170. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

ANNEX 6

Prosecutor v. Mirloslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac, Decision on Judicial Notice, 8 June 2000.

ANNEX 7

IN THE TRIAL CHAMBER

Before:
Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
8 June 2000

THE PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC
DRAGOLJUB PRCAC

DECISION ON JUDICIAL NOTICE

The Office of the Prosecutor:

Ms. Brenda Hollis
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Defence Counsel:

Mr. Krstan Simic for Miroslav Kvocka
Mr. Zarko Nikolic for Milojica Kos
Mr. Toma Fila for Mladjo Radic
Mr. Simo Tosic for Zoran Zigic
Mr. Jovan Simic for Dragoljub Prcac

TRIAL CHAMBER I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal");

NOTING Rules 54, 73 and 94 of the Rules of Procedure and Evidence (hereinafter "the Rules");

NOTING the "Prosecutor's Motion for Judicial Notice of Adjudicated facts" filed on 11 January 1999 and listing in its Annex I 583 paragraphs from the judgements in *Prosecutor* v. *Dusko Tadic* ("the *Tadic* judgement") and *Prosecutor v. Zejnil Delalic, et al.* ("the *Celebici* judgement"), (hereafter, "the Prosecutor's motion dated 11 January 1999");

NOTING the decision of Trial Chamber III in this case dated 19 March 1999 taking judicial notice of facts contained in paragraphs 1 to 6, 8, 10 to 17, 21 to 70, 74, 78 to 87, 89, 96 to 113, 115 to 125 of the Annex I of the Prosecutor's Motion;

NOTING the appeal judgement of 15 July 1999 in case number IT-94-1-A, *Prosecutor v. Dusko Tadic*, and in particular paragraph 148;

NOTING the submissions of the parties following the Prosecutor's Motion of 11 January 1999 and in particular:

NOTING the "Defence Proposal for Admission of Adjudicated Facts" filed by the accused Radic on 2 February 2000, in which he agrees to judicial notice of the facts from the *Tadic* judgement with the exception of those listed in paragraphs 421 and 422 of the annex to the Prosecutor's motion; and the "Motion of the Defence of the Accused Milojica Kos Concerning the Admission of Adjudicated Facts" dated 9 February 2000;

NOTING the "Prosecution's Response to Defence Motions for the Admission of Adjudicated Facts" dated 14 February 2000, in which the Prosecutor argues that if judicial notice is taken of the facts from *Tadic*, such decision should apply to all accused, whether or not they consent;

NOTING the "Order on Judicial Notice" dated 17 February 2000 requiring the defence to respond to the previous pleadings and specify which paragraphs, if any, in the annex to the Prosecutor's motion dated 11 January 1999 they find objectionable;

NOTING the "Defence Motion Pursuant to the Trial Order Dated 17 February 2000" filed by Zigic on 22 February 2000, in which he objects to the taking of judicial notice;

HAVING HEARD the Prosecution and defence of the accused persons, Kvocka, Kos, Radic et Zigic, in a status conference on 24 February 2000, at which time the parties stated that they had reached an agreement on the facts contained in 444 out of the 583 paragraphs proposed by the Prosecutor in the annex I to her motion dated 11 January 1999;

HAVING HEARD the defence of the accused Prcac at the Status Conference on 12 April 2000, in which he also accepted the facts included in the 444 paragraphs just mentioned;

NOTING the "Prosecution's Rule 65 *ter* (E) (ii) Motion for Judicial Notice" dated 28 April 2000 requesting the Trial Chamber to take judicial notice of the facts contained in the 444 paragraphs mentioned about and to draw legal conclusions and in particular, to declare that the facts establish beyond a reasonable doubt the common elements of Articles 3 and 5 of the Statute, notably: that there was an armed conflict in the times and places alleged in the indictment; that the victims of the acts and omissions alleged in the indictment were persons taking no active part in the hostilities pursuant to Article 3 common to the Geneva Conventions of 1949; that there was a nexus between the acts or omissions alleged in the indictment and the armed conflict; that there was an ongoing widespread or systematic attack against the Bosnian Muslim and Bosnian Croat population in the times and places alleged in the indictment; that the acts or omissions alleged in the indictment were committed as part of

or in the context of that widespread or systematic attack; and that the acts or omissions alleged in the indictment were committed during an armed conflict, whether international or internal in character;

NOTING "Defence Response to Prosecution's Motion for Clarification of Additional Matters and Prosecution's Rule 65 Motion for Judicial Notice" dated 2 May 2000 in which the defence of Radic agrees to the judicial notice of the facts contained in the aforementioned 444 paragraphs but objects to drawing the legal conclusions related to Articles 3 and 5 of the Statute;

NOTING the "Response of the Accused Kos to the Prosecution's Rule 65*ter* (E) (ii) Motion for Judicial Notice Filed on 28 April 2000," in which he agrees to the judicial notice of the facts contained in the 444 paragraphs but opposes any Trial Chamber finding that the adjudicated facts establish beyond a reasonable doubt the common elements of the crimes under Articles 3 and 5 of the Statute;

NOTING the "Prosecution's Reply to Defence Response to "Prosecution's Motion for Clarification of Additional Matters and Prosecution's Rule 65 Motion for Judicial Notice"" dated 19 May 2000, in which the Prosecutor contends that the arguments raised by the accused Radic are without merit;

NOTING the "Defence Reply to Prosecution's Reply to Defence Response to "Prosecution's Motion for Clarification of Additional Matters and Prosecution's Rule 65 Motion for Judicial Notice"" of Radic (dated 23 May 2000 but filed 30 May 2000, following the authorization by the Trial Chamber to file a reply), in which the defence stresses its belief that drawing conclusions that the agreed upon adjudicated facts prove beyond a reasonable doubt the common elements of Articles 3 and 5 would be the practical equivalent of turning that agreement into a guilty plea;

HAVING HEARD the parties, and in particular the Defense of all accused, during the status conference dated 6 June 2000;

CONSIDERING that the defence of the accused Radic opposes the Trial Chamber's drawing legal conclusions on the common elements of Articles 3 and 5 of the Statute on the grounds that Rule 94 authorizes judicial notice of facts but not legal conclusions; that the parties are not allowed to resolve legal issues through mutual negotiation; that consent to a finding on the common elements could be considered to be a confession of guilt; that the common elements of Articles 3 and 5 may only be considered at the same time as individual criminal responsibility is considered pursuant to Article 7(1) and 7(3) of the Statute; that there was a widespread and/or systematic attack in Bosnia and Herzegovina not only on the Muslim and Croat civilian population, but also on the Serb population; and that the armed conflict did not have an international character;

CONSIDERING that the defence of the accused Kos opposed the Trial Chamber's drawing legal conclusions on the common elements of Articles 3 and 5 of the Statute on the grounds that Rule 94 is intended to cover facts and not the legal conclusions inferred from those facts, as was held by Trial Chamber III in its decision of 25 March 1999 in *Prosecutor v. Simic*; and that such legal findings have no biding force except between the parties in respect of a particular case;

CONSIDERING that the Prosecutor argues that the Trial Chamber has the inherent power to draw legal conclusions from facts established beyond a reasonable doubt at any time in the proceeding; that the importance of the judicial notice by the trial chamber of the 444 adjudicated facts agreed to by the parties is that those facts are proven beyond a reasonable doubt, and conclusions may therefore be drawn from them; that in most national judicial systems, issues concerning the jurisdictional elements of crimes are often determined *in limine;* that during the 24 February 2000 status conference, the defence of the accused Radic accepted "the positions presented in the Tadic judgement, and the elements on the basis

of which such judgement was made" and the defence of Kvocka said "we accept all the facts that are relevant to the jurisdiction of the Tribunal, the conflict, the fact that it was an armed conflict, the question of the nature and the ethnicity of the prisoners and so on"; that the question of the existence of the common elements of Articles 3 and 5 is completely distinct from the determination of the individual criminal responsibility of the accused, such that establishment of those elements cannot be deemed a confession;

CONSIDERING that the Prosecution believes that the defence of the accused Radic is partially correct when it says that parties are not authorized to resolve legal issues, including the common elements of the offences, by mutual negotiation, but that parties can make an agreement pursuant to Rule 65*ter* and that, while the Trial Chamber is not bound by a potential agreement between the parties about those elements, it may accept the agreement as a basis for making findings about the existence of the common elements;

CONSIDERING that the amended indictment dated 31 May 1999 charges the accused with violations of the laws and customs of war and crimes against humanity in Bosnia-Herzegovina in the Prijedor municipality and in particular in the Omarska, Keraterm and Trnopolje camps between 26 May and 30 August 1992; and that the accused Ducko Tadic was convicted of crimes committed in the same places between 23 May and 31 December 1992, and his appeal is completed and his conviction has now become final; that the Celebici judgement (the Trial Chamber observes that it is now on appeal) also concerns the conflict in Bosnia-Herzegovina at the same time;

CONSIDERING that the parties accepted, during the status conferences on 24 February 2000 and 12 April 2000, that it was in the interests of justice, and in particular of expediting the trial, that judicial notice should be taken of facts included in 444 out of the 583 paragraphs listed by the Prosecutor from the *Tadic* and Celebici cases, which are relevant to the present case, since this would relieve the parties from presenting proof on uncontested issues regarding the historical context, geography, military and administrative situation of the Prijedor municipality between 23 May and 31 December 1992;

CONSIDERING that the Trial Chamber notes that Rule 94 permits it to take judicial notice of adjudicated facts from other proceedings of the Tribunal relating to matters at issue in the current proceedings; that Trial Chamber III already took judicial notice of facts included in 94 out of the 444 paragraphs in its aforementioned decision dated 19 March 1999 concerning the accused Kvocka, Kos, Radic and Zigic; that there exists an agreement between the parties about the facts included in 444 of the paragraphs mentioned in the Prosecutor's motion dated 11 January 1999; that the Trial Chamber informed the parties that it took note of the agreement;

CONSIDERING that even if Rule 94 is concerned only with judicial notice of facts and documentary evidence, no provision in the Statute or the Rules forbids the Trial Chamber, having taken account of the rights of the accused, from drawing legal conclusions based on facts thereby established beyond a reasonable doubt;

CONSIDERING that the Defense of the accused was given the opportunity to make its argument at the Status Conference on 6 June 2000, whether any legal conclusion about the common elements of Articles 3 and 5 of the Statute could be based on the agreed adjudicated facts; that the Defense of the accused Kos, supported by the Defense of the accused Prcac, submitted that some of the required elements of Articles 3 and 5 of the Statute could be based upon the agreed facts;

CONSIDERING that the Trial Chamber agrees with the Defence that it is still up to the Prosecution to prove the individual responsibility of the accused for the crimes in the indictment;

CONSIDERING that it results necessarily and incontestably from the facts that the parties have agreed upon and which the Trial Chamber is taking judicial notice of, that there was an armed conflict, accompanied by a widespread and systematic attack on the Muslim and Croat civilian population, in the times and places alleged in the indictment; and it further is included in these agreed upon facts that the existence of the Omarska, Keraterm and Trnopolje camps and the mistreatment of the prisoners in those camps was linked to the armed conflict and to the widespread and systematic attack on the civilian population[1];

CONSIDERING that the determination so made by the Chamber does not indicate in itself that the accused are responsible for the commission of the alleged crimes; and that it is up to the Prosecutor to prove such responsibility under Article 7(1) and Article 7(3) of the statute, and that the defence is entitled to raise its arguments on these points in the full exercise of its rights;

FOR THE FOREGOING REASONS

TAKES JUDICIAL NOTICE of the facts contained in paragraphs 1 to 330[2], 332, 334 to 339, 342, 343, 345 to 366, 475 to 492, 519 to 583 in the annex I to the motion of the Prosecutor dated 11 January 1999;

DECIDES that at the times and places alleged in the indictment, there existed an armed conflict; that this conflict included a widespread and systematic attack against notably the Muslim and Croat civilian population; and that there was a nexus between this armed conflict and the widespread and systematic attack on the civilian population and the existence of the Omarska, Keraterm and Tronpolje camps and the mistreatment of the prisoners therein.

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

Done this eight day of June 2000,
At The Hague
The Netherlands.

_____
Almiro Rodrigues
Presiding Judge

[Seal of the Tribunal]

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1. In particular, paragraphs 559 to 574 concern the existence of an armed conflict and paragraphs 575 to 583 are related to the existence of a nexus between the armed conflict and the mistreatment of persons detained in the camps.
2. The 19 March 1999 decision of Trial Chamber III regarding the accused Kvocka, Kos, Radic and Zigic took judicial notice of the facts in paragraphs 1 to 6, 8, 10 to 17, 21 to 70, 74, 78 to 87, 89, 96 to 113, 115 to 125 of the aforementioned Annex I.

ANNEX 7

Prosecutor v. Kanyabashi, ICTR-96-15-T, Decision on Jurisdiction, 18 June 1997.

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ICTR-96-15-T
(730-719)
3-7-97

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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Trial Chamber 2

Before: Judge William H. Sekule, Presiding Judge
Judge Tafazzal H. Khan
Judge Navanethem Pillay

OR: ENG

Registrar: Mr. Frederik Harhoff

Decision of: 18 June 1997

THE PROSECUTOR
versus
JOSEPH KANYABASHI

Case No. ICTR-96-15-T

DECISION ON THE DEFENCE MOTION ON JURISDICTION

Office of the Prosecutor:

Mr. Yacob Haile-Mariam

Counsel for the Defence

Mr. Evans Monari
Mr. Michel Marchand

THE TRIBUNAL,

SITTING AS Trial Chamber 2 of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge William H. Sekule as Presiding Judge, Judge Tafazzal H. Khan and Judge Navanethem Pillay;

CONSIDERING the indictment submitted by the Prosecutor against Joseph Kanyabashi pursuant to Rule 47 of the Rules of Procedure and Evidence ("the Rules") and confirmed by Judge Yakov A. Ostrovsky on 15 July 1996 on the basis that there existed sufficient evidence to provide reasonable grounds for believing that he has committed genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto;

TAKING NOTE of the transfer of the accused from Belgium to the Tribunal's Detention Facilities on 8 November 1996 and his initial appearance on 29 November 1996 before this Chamber;

BEING NOW SEIZED OF the preliminary motion filed by the Defence Counsel on 17 April 1997 pursuant to Rule 73(A)(i) of the Rules, challenging the jurisdiction of the Tribunal;

HAVING ALSO RECEIVED the Prosecutor's response, filed on 22 May 1997, to the Defence Counsel's motion;

HAVING HEARD the parties at the hearing of the Defence Counsel's motion and the Prosecutor's response, held on 26 May 1997;

CONSIDERING the provisions of the UN Charter, the Statute of the Tribunal and the Rules, in particular Rules 72 and 73;

TAKING INTO CONSIDERATION the decision of 10 August 1995 of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in Case No. IT-94-1-T, The Prosecutor versus Duško Tadić; and the decision of 2 October 1995 rendered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in Case No. IT-94-1-AR72, on appeal of the said decision of the Trial Chamber.

AFTER HAVING DELIBERATED:

1. The Defence Counsel submitted his preliminary motion pursuant to Rule 73(A)(i) of the Rules 139 days after the initial appearance of the accused. By so doing, he manifestly exceeded the time-limit prescribed in Rule 73(B) of the Rules, which stipulates that preliminary motions by the accused shall be brought within sixty (60) days after the initial appearance, and in any case before the hearing on the merits. Rule 73(C) of the Rules further lays down that failure to apply within this time-limit shall constitute a waiver of the right, unless the Trial Chamber grants relief to hear the preliminary motion upon good cause being shown by the Defence Counsel.

2. The Trial Chamber, therefore, must first examine whether there are reasonable grounds for proceeding with the examination of this preliminary motion.

A. On the Consequence of the Defence Counsel's Failure to Submit his Preliminary Motion Within Sixty Days After the Initial Appearance Of the Accused.

3. Rule 72(B) of the Rules allows the Prosecution as well as the Defence to file preliminary motions and further establishes that the Trial Chamber shall dispose thereof *in limine litis*. The purpose of this requirement, evidently, is to ensure that all basic questions and fundamental objections raised by the parties against the competence, the proceedings and the functions of the Tribunal are properly addressed and dealt with before the beginning of the trial on its merits.

4. Rule 73(A) identifies some of the preliminary motions which must, for reasons of expediency, be raised and disposed of before the beginning of the trial on the merits, such as objections against the jurisdiction of the Tribunal or against defects in the indictment. Rule 73(B), accordingly, specifies that such motions must be filed within sixty (60) days after the initial appearance in order to ensure their consideration well in advance of the trial. Rule 73(C) goes on to establish that failure to meet the time-limit shall constitute a waiver of the right to submit such preliminary motions. If, however, the Defence shows good cause, the Trial Chamber might grant relief from this waiver. These Rules are clear and leave no room for misunderstanding.

5. The Trial Chamber notes, however, that the Defence motion was filed out of time, and was surprised that neither the Defence nor the Prosecutor made any reference to this fact when the preliminary motion was heard by the Trial Chamber. Defence Counsel did not file any request for a waiver and did not provide the Trial Chamber with any explanation for his failure to respect the prescribed time-limit. The Prosecutor, on her part, did not object to hearing this motion

6. Notwithstanding the fact that some of the questions raised by the Defence Counsel have already been addressed in the decision rendered on 2 October 1995 by the Appeals Chamber for the Former Yugoslavia, the Trial Chamber finds that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interests of justice, that the Defence Counsel's motion deserves a hearing and full consideration. The Trial Chamber, therefore, grants relief from the waiver *suo motu* and will thus proceed with the examination of the Defence Counsel's preliminary motion.

B. On the Substance of the Preliminary Motion

7. In his preliminary motion, the Defence Counsel raised a number of challenges concerning the jurisdiction of the Tribunal. These challenges can be adequately condensed into the following five principal objections:

(i) That the sovereignty of States, in particular that of the Republic of Rwanda, was violated by the fact that the Tribunal was not established by a treaty through the General Assembly;

(ii) that the Security Council lacked competence to establish an ad-hoc Tribunal under Chapter VII of the UN Charter;

(ii) that the Security Council lacked competence to establish an ad-hoc Tribunal under Chap ter VII of the UN Charter;

(iii) that the primacy of the Tribunal's jurisdiction over national courts was unjustified and violated the principle of *jus de non evocando*;

(iv) that the Tribunal cannot have jurisdiction over individuals directly under international law; and

(v) that the Tribunal is not and cannot be impartial and independent;

8. The Prosecutor responded that the basic arguments in the Defence Counsel's motion were addressed by the Trial Chamber and, in particular, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadić-case. The Trial Chamber notes that, in terms of Article 12(2) of the Statute, the two Tribunals share the same Judges of their Appeals Chambers and have adopted largely similar Rules of Procedure and Evidence for the purpose of providing uniformity in the jurisprudence of the two Tribunals. The Trial Chamber, respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and has taken careful note of the decision rendered by the Appeals Chamber in the Tadic case.

B.1. On the Defence Counsel's Objection that the Sovereignty of States, in Particular that of the Republic of Rwanda, Was Violated by the Fact that the Tribunal Was Not Established by a Treaty Through the General Assembly.

9. The Defence Counsel submitted in his written and oral submissions that the Tribunal should and in fact could only have been established by an international treaty upon recommendation of the General Assembly, which would have permitted the member States of the United Nations to express their approval or disapproval of the establishment of an ad-hoc Tribunal. The Defence Counsel argued that by leaving the establishment of the Tribunal to the Security Council through a Resolution under Chapter VII of the UN Charter, the United Nations not only encroached upon the sovereignty of the Republic of Rwanda, and other Member States, but also frustrated the endeavours of its General Assembly to establish a permanent criminal court. The Tribunal, in the Defence Counsel's view, was therefore not lawfully established.

10. The Prosecutor, in response to this first objection raised by Defence Counsel, rejected the notion that the Tribunal was unlawfully established and contended that, since there was a need for an effective and expeditious implementation of the decision to establish the Tribunal, the treaty approach would have been ineffective because of the considerable time required for the establishment of an instrument and for its entry into force.

11. The Trial Chamber finds that two issues need to be addressed. One is whether the accused as an individual has *locus standi* to raise a plea of infringement of the sovereignty of States, in particular that of the Republic of Rwanda, and the other is whether the sovereignty of the Republic of Rwanda and other Member States were in fact violated in the present case.

12. As regards the first of these questions, the Appeals Chamber held in the Tadić-case that

> "To bar an accused from raising such a plea is tantamount to deciding that , in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. "

The Trial Chamber agrees with this conclusion and accepts that the accused in the present case can raise the plea of State sovereignty. In any event, it is the individual and not the State who has been subjected to the jurisdiction of the Tribunal.

13. As regards the second question whether the sovereignty of the Republic of Rwanda has been violated by the Security Council's decision to establish the Tribunal, the Trial Chamber notes that membership of the United Nations entail certain limitations upon the sovereignty of the member States. This is true in particular by virtue of the fact that all member States, pursuant to Article 25 of the UN Charter, have agreed to accept and carry out the decisions of the Security Council in accordance with the Charter. For instance, the use of force against a State sanctioned by the Security Council in accordance with Article 41 of the UN Charter is one clear example of limitations upon sovereignty of the State in question which can be imposed by the United Nations.

14. The Trial Chamber notes, furthermore, that the establishment of the ICTR was called for by the Government of Rwanda itself, which maintained that an international criminal tribunal could assist in prosecuting those responsible for acts of genocide and crimes against humanity and in this way promote the restoration of peace and reconciliation in Rwanda. The Ambassador of Rwanda, during the discussion and adoption of Resolution 955 in the Security Council on 8 November 1994 declared that:

> "The tribunal will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person, all of which will be possible only if those responsible for the Rwandese tragedy are brought to justice."

15. Against this background, the Trial Chamber is of the view that the Security Council's establishment of the Tribunal through a Resolution under Chapter VII of the UN Charter and with the participation of the Government of Rwanda, rather than by a treaty adopted by the Member States under the auspices of the General Assembly, did not violate the sovereignty of the Republic of Rwanda and that of the Member States of the United Nations..

16. The Defence Counsel further argued that the establishment of the Tribunal through a resolution of the Security Council effectively undermined the General Assembly's initiative to set up a permanent international Criminal Court. The Trial Chamber, however, mindful of the fact that such a tribunal may well be created by an international treaty, finds that this question has no bearing on the jurisdiction of this Tribunal and must therefore, be rejected.

B.2. On the Defence Counsel's Objections that the Security Council Lacked Competence to Establish an *ad-hoc* Tribunal under Chapter VII of the UN Charter

17. The second main issue addressed by the Defence relates to the interpretation and delimitation of Chapter VII of the UN Charter and more specifically to the contents and boundaries of the authority of the Security Council.

18. In his written and oral submissions, the Defence Counsel argued that the establishment of the Tribunal by the Security Council was ill-founded for five basic reasons:

(i) that the conflict in Rwanda did not pose any threat to international peace and security;

(ii) that there was no international conflict to warrant any action by the Security Council;

(iii) that the Security Council thus could not act within Chapter VII of the UN Charter;

(iv) that the establishment of an ad-hoc tribunal was never a measure contemplated by Article 41 of the UN Charter; and finally

(v) that the Security Council has no authority to deal with the protection of Human Rights.

The Trial Chamber will now examine each of these contentions in turn.

19. ***"The conflict in Rwanda did not pose any threat to international peace and security"***.

On several occasions, e.g. in Congo, Somalia and Liberia, the Security Council has established that incidents such as sudden migration of refugees across the borders to neighbouring countries and extension or diffusion of an internal armed conflict into foreign territory may constitute a threat to international peace and security. This, might happen, in particular where the areas immediately affected have exhausted their resources. The reports submitted by the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (see Doc. S/1994/1157) and also by the Commission of Experts appointed by the Secretary General (see Doc. S/1994/1125) concluded that the conflict in Rwanda as well as the stream of refugees had created a highly volatile situation in some of the neighbouring regions. As a matter of fact, this conclusion was subsequently shared by the Security Council and formed the basis for the adoption of Security Council's resolution 955 (1994) of 8 November 1994.

20. Although bound by the provisions in Chapter VII of the UN Charter and in particular Article 39 of the Charter, the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber.

21. While it is true that the conflict in Rwanda was internal in the sense that it emerged from inherent tensions between the two major groups forming the population within the territory of Rwanda and otherwise did not involve the direct participation of armed forces belonging to any other State, the Trial Chamber cannot accept the Defence Counsel's notion that the conflict did not pose any threat to international peace and security. The question of, whether or not the conflict posed a threat to international peace and security is a matter to be decided exclusively by the Security Council. The Trial Chamber nevertheless takes judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into the neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries where the refugees had settled. The demographical composition of the population in certain neighbouring regions outside the territory of Rwanda, furthermore, showed features which suggest that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.

22. The Trial Chamber concludes that there is no merit in the Defence Counsel's argument that the conflict in Rwanda did not pose any threat to international peace and security and holds that this was a matter to be decided exclusively by the Security Council.

23. ***"There was no international conflict to warrant any action by the Security Council."***
The Defence Counsel further contends that there was no international conflict to warrant any action by the Security Council. This argument has been partly addressed in the preceding paragraphs in the sense that *if* the Security Council had decided that the conflict in Rwanda did in fact pose a threat to international peace and security, this conflict would thereby fall within the ambit of the Security Council's powers to restore and maintain international peace and security pursuant to the provisions in Chapter VII of the UN Charter.

24. The Security Council's authority to take such action, furthermore, exists independently of whether or not the conflict was deemed to be international in character. The decisive pre-requisite for the Security Council's prerogative under Article 39 and 41 of the UN Charter is not whether there *exists* an *international* conflict, but whether the conflict at hand entails a threat to international peace and security. Internal conflicts, too, may well have international implications which can justify Security Council action. The Trial Chamber holds that there is no basis for the Defence Counsel's submission that the Security Council's competence to act rested on a pre-existing international conflict.

25. ***"The Security Council could not act within Chapter VII of the UN Charter."***
During his oral submission, the Defence Counsel further added that the Security Council was not competent to act in the case of the conflict in Rwanda because international peace and security had already been re-established by the time the Security Council decided to create the Tribunal.

26. The Trial Chamber observes, once again, that this argument entails a finding of fact based on evidence and that, in any case, the question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself. The Trial Chamber notes, in particular, that cessation of the atrocities of the conflict does not necessarily imply that international peace and security had been restored, because peace and security cannot be said to be re-established adequately without justice being done. In the Trial Chamber's view, the achievement of international peace and security required that swift international action be taken by the Security Council to bring to justice those responsible for the atrocities in the conflict.

27. ***"The establishment of an ad-hoc tribunal was never a measure contemplated by Article 41 of the UN Charter."***
The thrust of this argument lies in the contention that the establishment of an ad-hoc Tribunal to prosecute perpetrators of genocide and violations of international humanitarian law is not a measure contemplated by the provisions of Chapter VII of the UN Charter. While it is true that establishment of judicial bodies is not directly mentioned in Article 41 of the UN Charter as a measure to be considered in the restoration and maintenance of peace, it clearly falls within the ambit of measures to satisfy this goal. The list of actions contained in Article 41 is clearly not exhaustive but indicates some examples of the measures which the Security Council might eventually decide to impose on States in order to remedy a conflict or an imminent threat to international peace and security. This is also the view of the Appeals Chamber in the Tardic-case.

28. ***"The Security Council has no authority to deal with the protection of Human Rights"***
Finally, the Defence Counsel holds that the international protection of Human Rights is embedded in particular international instruments such as the global International Covenants on Civil and Political Rights & Social, Economic and Cultural Rights and in the regional conventions on Human Rights for Europe and Africa, all of which have established particular international institutions entrusted with the task of protecting the body of international Human Rights. The Defence Counsel claims, therefore, that the protection of Human Rights is not a matter for the Security Council.

29. The Trial Chamber cannot accept the Defence Counsel's argument that the existence of specialized institutions for the protection of Human Rights precludes the Security Council from taking action against violation of this body of law. Rather to the contrary, the protection of international Human Rights is the responsibility of all United Nations organs, the Security Council included, without any limitation, in conformity with the UN Charter.

B.3. On the Defence Counsel's Objections Against the Primacy of the Tribunal's Jurisdiction Over National Courts and Against Violation of the Principle of *Jus de non Evocando.*

30. Although the Defence Counsel did not explicitly challenge the primacy of the Tribunal's jurisdiction over national courts, this objection is implied in the Defence Counsel's contention that establishment of the Tribunal violated the principle of *jus de non evocando*.

31. This principle, originally derived from constitutional law in civil law jurisdictions, establishes that persons accused of certain crimes should retain their right to be tried before the regular domestic criminal Courts rather than by politically founded ad-hoc criminal tribunals which, in times of emergency, may fail to provide impartial justice. As stated by the Appeals Chamber in the Tadić-case: "As a matter of fact and of law the principle advocated by the Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial." In the Trial Chamber's opinion, however, the Tribunal is far from being an institution designed for the purpose of removing, for political reasons, certain criminal offenders from fair and impartial justice and have them prosecuted for political crimes before prejudiced arbitrators.

32. It is true that the Tribunal has primacy over domestic criminal Courts and may at any stage request national Courts to defer to the competence of the Tribunal pursuant to article 8 of the Statute of the Tribunal, according to which the Tribunal may request that national Courts defer to the competence of the Tribunal at any stage of their proceedings. The Tribunal's primacy over national Courts is also reflected in the principle of *non bis in idem* as laid down in Article 9 of the Statute and in Article 28 of the Statute which establishes that States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber. The primacy thereby entrenched for the Tribunal, however, is exclusively derived from the fact that the Tribunal is established under Chapter VII of the UN Charter, which in turn enables the Tribunal to issue directly binding international legal orders and requests to States, irrespective of their consent. Failure of States to comply with such legally binding orders and requests may, under certain conditions, be reported by the President of the Tribunal to the Security Council for further action.

The Trial Chamber concludes, therefore, that the principle of *jus de non evocando* has not been violated.

B.4. On the Defence Counsel's Objections Against the Tribunal's Jurisdiction over Individuals Directly under International Law.

33. The Defence Counsel further contends that bestowing the Tribunal with jurisdiction over individuals is inconsistent with the UN Charter, for the reason that the Security Council has no authority over individuals, and that only States can pose threats to international peace and security.

34. The Prosecution responded to this contention by citing the Nüremberg Trials which, in the Prosecution's view, established that individuals who have committed crimes under international law can be held criminally responsible directly under international law. The Prosecutor further contended that attribution of individual criminal responsibility is a fundamental expression of the need for enforcement action by the Security Council. It is indeed difficult to separate the individual from the State, as the duties and rights of States are only duties and rights of the individuals who compose them, and as international criminal law, like other branches of law, deals with the regulation of human conduct. It is to individuals, not the abstract, that international law applies, and it is against individuals that it should provide sanctions. In the words of the Deputy Prosecutor in the trial against *Frank Hans* in 1946:

> "It seems intolerable to every sensitized human being that the men who put their good will at disposition of the State entity in order to make use of the power and material resources of this entity to slaughter, as they have done, millions of human beings in the execution of a policy long since determined, should be assured of immunity. The principle of State sovereignty which might protect these men is only a mask; this mask removed, the man's responsibility reappears."

35. The Trial Chamber recalls that the question of direct individual criminal responsibility under international law is and has been a controversial issue within and between various legal systems for several decades and that the Nüremberg trials in particular have been interpreted differently in respect of the position of the individual as a subject under international law. By establishing the two International Criminal Tribunals for the Former Yugoslavia and Rwanda, however, the Security Council explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law. In doing so, the Security Council provided an important innovation of international law, but there is nothing in the Defence Counsel's motion to suggest that this extension of the applicability of international law against individuals was not justified or called for by the circumstances, notably the seriousness, the magnitude and the gravity of the crimes committed during the conflict.

36. In his submissions, furthermore, the Defence Counsel referred to a number of other areas of conflicts and incidents in which the Security Council took no action to establish an international criminal tribunal, e.g. Congo, Somalia and Liberia, and the Defence Counsel seems to infer from the lack of such action in these cases that individual criminal responsibility should not be taken in the case of the conflict in Rwanda. The Trial Chamber, however, disagrees entirely with this perception. The fact that the Security Council, for previously prevailing geo-strategic and international political reasons, was unable in the past to take adequate measures to bring to justice the

perpetrators of crimes against international humanitarian law is not an acceptable argument against introducing measures to punish serious violations of international humanitarian law when this becomes an option under international law. The Trial Chamber, thus, cannot accept the Defence Counsel's objections against the Tribunal's jurisdiction over individuals.

B.5. On the Defence Counsel's Objections Based on the Allegation that the Tribunal is not Impartial and Independent.

37. The Defense Motion asserted that the Tribunal was set up by the Security Council, a political body and as such the Tribunal is just another appendage of an international organ of policing and coercion, devoid of independence.

38. The Prosecutor, in response, challenged the claim in the Defense Motion that the Tribunal cannot act both as a subsidiary organ of the Security Council and as an independent Judicial body. He stated that although the ICTY and the ICTR share certain aspects of personnel, materials and means of operation, the Tribunal for Rwanda is a separate Tribunal with its own Statute, its own sphere of jurisdiction and its own rules of operation and as such it has legal independence.

39. This Trial Chamber is of the view that criminal courts worldwide are the creation of legislatures which are eminently political bodies. This was an observation also made by the Trial Chamber in the Tadić-case. To support this view, the Trial Chamber in that case relied on *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (1954) I.C.J. 47, 53; Advisory Opinion of 13 July), which specifically held that a political organ of the United Nations, in that case the General Assembly, could and had created "an independent and truly judicial body." Likewise, the Security Council could create such a body using its wide discretion under Chapter VII.

40. This independence is, for example, demonstrated by the fact that the Tribunal is not bound by national rules of evidence as stated under rule 89 A of the Rules of Procedure and Evidence. The Tribunal is free to apply those Rules of Evidence which best favor a fair determination of the matter before it as stipulated in rule 89(B) of the Rules.

41. Further, the judges of the Tribunal exercise their *judicial* duties independently and freely and are under oath to act honorably, faithfully, impartially and conscientiously as stipulated in rule 14 of the Rules. Judges do not account to the Security Council for their judicial functions.

42. In this Trial Chamber's view, the personal independence of the judges of the Tribunal and the integrity of the Tribunal are underscored by Article 12 (1) of the Statute of the Tribunal which states that persons of high moral character, integrity, impartiality who possess adequate qualifications to become judges in their respective countries and having widespread experience in criminal law, international law including international humanitarian law and human rights law, shall be elected.

43. This Trial Chamber also subscribes to a view which was expressed by the Appeals Chamber in the Tadic case that when determining whether a tribunal has been 'established by law', consideration should be made to the setting up of an organ in keeping with the proper international standards providing all the guarantees of fairness and justice.

44. Under the Statute and the Rules of Procedure and Evidence, the Tribunal will ensure that the accused receives a fair trial.This principle of fair trial is further entrenched in Article 20 which embodies the major principles for the provision of a fair trial, *inter alia,* the principles of public hearing and subject to cross examination. The rights of the accused are also set out such as the right to counsel, presumption of innocence until the contrary is proved beyond a reasonable doubt, privilege against self-incrimination and the right to adequate time for the preparation of his/her case. These guarantees are further included in rules 62, 63 and 78 of the Rules.The rights of the accused enumerated above are based upon Article 14 of the International Covenant on Civil and Political Rights and are similar to those found in Article 6 of the European Convention on Human Rights.

45. Defence Counsel argued that the obligation imposed on the Tribunal to report to the Security Council derogates its independence as a judicial organ. The Prosecutor contended that this obligation was discretionary. In fact it is mandatory. In Article 34 of the Statute, the Tribunal is duty bound to do this annually. This requirement is not only a link between it and the Security Council but it is also a channel of communication to the International community, which has an interest in the issues being addressed and the right to be informed of the activities of the Tribunal. In the Chamber`s view, the Tribunal`s obligation to report progress to the Security Council is purely administrative and not a judicial act and therefore does not in any way impinge upon the impartiality and independence of it`s judicial decision.

46. The Defence Counsel further contended that African jurisprudence and Human Rights Covenants were overlooked in the setting up the Tribunal. This contention cannot be correct because the important instruments on human rights in Africa, including the Charter of the Organization of African Unity (O.A.U.) and the African Charter On Human Rights ("the African Charter") were indirectly included in the law applicable to the Tribunal. Articles 3 and 7 of the African Charter on Human and People's Rights, for example, contain rights which are similar to those guaranteed in the Statute.

47. The Defence Counsel argued that the impartiality of the of the Tribunal has not been demonstrated for the reason that there has been selective prosecution only of persons belonging to the Hutu ethnic group.

48. In his response, the Prosecutor dismissed these allegations and stated that indictments have been issued against leading perpetrators of the genocide and that subject to the availability of evidence, he intended to prosecute Hutu and Tutsi "extremists". The use of the word "extremists" is inaccurate and unfortunate, in view of Article 1 of the statute.

49. The Trial Chamber simply reiterates that, pursuant to Article 1 of the Statute, all persons who are suspected of having committed crimes falling within the jurisdiction of the Tribunal are liable to prosecution.

50. The Trial Chamber is not persuaded by the arguments advanced by the Defence Counsel that the Tribunal is not impartial and independent and accordingly rejects this contention.

FOR THESE REASONS,

DECIDES to dismiss the motion submitted by the Defence Counsel challenging the jurisdiction of the Tribunal.

Arusha, 18 June 1997.

William H. Sekule
Presiding Judge

T. H. Khan
Judge

Navanethem Pillay
Judge

Pronounced in Open Court on the 3rd of July 1997

Presiding Judge

(Seal of the Tribunal)

ANNEX 8

Prosecutor v. Kayishema & Ruzindana, ICTR-95-1-T, Judgement, 21 May 1999, para. 273.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Before:
Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pascal Besnier
Mr. Willem Van der Griend

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5.2 DID GENOCIDE OCCUR IN RWANDA AND KIBUYE IN 1994?

273. A question of general importance to this case is whether genocide took place in Rwanda in 1994 as the Prosecution has alleged. Considering the plethora of official reports, including United Nations documents,[19] which confirm that genocide occurred in Rwanda and the absence of any Defence argument to the contrary, one could consider this point, settled. Nevertheless, the question is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue. The Trial Chamber underscores that a finding that genocide took place in Rwanda is not dispositive of the question of the accused's innocence or guilt. It is the task of this Chamber to make findings of fact based on the Indictment against the accused and assess the evidence to make a finding of the possible responsibility of each person under the law only.

274. According to Article 2 of the Tribunal's Statute, genocide means various enumerated acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group as such. The enumerated acts include, *inter alia*, killing members of a group and causing serious bodily or mental harm to members of the group. The purpose of this Chapter is not to decide whether specific acts by particular individuals amounted to genocidal acts, that is, acts committed with the special intent to destroy the Tutsi group in whole or in part. Rather, this Chapter assesses whether the events in Rwanda as a whole, reveal the existence of the elements of the crime of genocide. Such a finding allows for a better understanding of the context within which perpetrators may have committed the crimes alleged in the Indictment. Additionally, because the Indictment concerns events that took place in Kibuye, this Chapter of the Judgment includes a general examination of the events in that *prefecture*.

275. The Trial Chamber heard testimony from the United Nations Special Rapporteur of the Commission on Human Rights, Dr. René Degni-Segui, whose credentials qualified him as an expert and whose testimony was convincing. The Trial Chamber is seized of his reports to the Security Council on the situation of human rights in Rwanda in 1994, which he submitted after conducting investigations throughout Cyangugu, Butare and Kibuye *prefectures*. *Inter alia*, Degni-Segui proffered evidence[20] before the Trial Chamber that perpetrators planned the genocide of the Tutsi population prior to 7 April 1994, and produced reports concerning the massacres, which occurred during hostilities. He testified that although to date no one has found any official written document outlining the genocidal plan, there exist sufficient indicators that a plan was in place prior to the crash of the President's plane on 7 April 1994. These indicators include (1) execution lists, which targeted the Tutsi elite, government ministers, leading businessmen, professors and high profile Hutus, who may have favoured the implementation of the Arusha Accords; (2) the spreading of extremist ideology through the Rwandan media which facilitated the campaign of incitement to exterminate the Tutsi population; (3) the use of the civil defence programme and the distribution of weapons to the civilian population; and, (4) the "screening" carried out at many roadblocks which were erected with great speed after the downing of the President's

plane.[21] The outcome of the implementation of these indicators was the massacres carried out throughout the country.

276. It is the opinion of the Trial Chamber that the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide. To make a finding on whether this plan existed, the Trial Chamber examines evidence presented regarding the more important indicators of the plan.

Background to the Events of 1994

277. The time was ripe in early 1994 for certain so-called Hutu extremists in power in Rwanda who opposed the Arusha Accords, to avoid having to share decision-making positions with opposition groups. After attending a meeting on the implementation of the Arusha Peace Accords, in Tanzania, President Juvénal Habyarimana was en route to Rwanda when his plane was shot down over Kigali airport and crashed on 6 April 1994. Witness O testified that he on 8 April heard a broadcast on Radio France International (RFI) that the Rwandan People's Army (RPA or FAR) had announced the end of the cease-fire. The state of fear that ensued, caused by the rumours about the intentions of the RPF to exterminate the Hutus and the terror and insecurity that prevailed in Rwanda, served as a pretext for the execution of the genocidal plan and consequently the retention of power by the extremist Hutus. Based on eyewitness and expert testimony and reports, immediately after the plane crash, on 7 April 1994 massacres began throughout Rwanda.

278. A radio announcement on the morning of 7 April, concerning the death of the President, ordered people to remain at home. This announcement was made in order to facilitate the movement of the soldiers and gendarmes from house to house to arrest and execute real and perceived enemies of the Hutu extremists, specifically those named on execution lists. Witnesses, including Degni-Segui and Prosecution witness RR, confirmed this fact.

The Effects of Extremist Ideology Disseminated Through the Mass Media

279. Military and civilian official perpetuated ethnic tensions prior to 1994. *Kangura* newspaper, established after the 1990 RPF invasion, Radio Television Mille Colline (RTLM) and other print and electronic media took an active part in the incitement of the Hutu population against the Tutsis. *Kangura* had published the "Ten Commandments" for the Hutus in 1991, which stated that the Tutsis were the enemy. In addition, according to witnesses, in 1991 ten military commanders produced a full report that answered the question how to defeat the enemy in the military, media and political domains. These witnesses also testified that in September 1992 the military issued a memorandum, based on the 1991 report, which also defined the "enemy" as the Tutsi population, thereby transferring the hostile intentions of the RPF to all Tutsis. According to one report, prior to 6 April, the public authorities did not openly engage in inciting the Hutus to perpetrate massacres. On 19 April however, the President of

the Interim Government, told the people of Butare to "get to work" in the Rwandan sense of the term by using their machetes and axes.

280. Several witnesses stated that during the atrocities "the Rwandese carried a radio set in one hand and a machete in the other."[22] This demonstrates that the radio was a powerful tool for the dissemination of ethnic hatred. Radio National and RTLM freely and regularly broadcasted ethnic hatred against the Tutsis. For example, a UNICEF report refers to an RTLM broadcast stating that "for babies who were still suckling . . . they [the assailants] had to cut the legs so that they would not be able to walk."[23] In 1992 Leon Mugesera, a professor turned propagandist for the MRND, declared in a public meeting "*nous ne commettrons pas l' erreur de '59 ou nous avons fait échoppé des plus jeunes*" (we will not make the 1959 mistake where we let the younger ones [Tutsis] escape.)[24] Mugusera also incited the Hutus by explaining that " . . . we must remove the entrails but there is shorter way, let us throw them into the river so they can go out of the country that way."[25] These speeches and reports became widely diffused through repetition in public meetings and through the mass media.

281. The dissemination and acceptance of such ideas was confirmed by a Hutu policeman to Prosecution witness Patrick de Saint-Exupery, a journalist reporting for the French newspaper *Le Figaro*. De Saint-Exupery remarked that the policeman had told him how they killed Tutsis "because they were the accomplices of the RPF" and that *no Tutsis should be left alive*.[26] (emphasis added.) This witness, who went to the Bisesero region late June 1994, described how "the hill was scattered, literally scattered with bodies, in small holes, in small ditches, on the foliage, along the ditches, there were bodies and there were many bodies."[27]

282. As a result of the diffusion of the anti-Tutsi propaganda, the killings "started off like a little spark and then spread."[28] Degni-Segui stated that many communities were involved. Butare was an exception as there was resistance to carrying out the killings because the *prefect* was a Tutsi. The killings did not start in Butare until 19 April, after the Interim Government sacked the *prefect* and after a visit and an inciting speech by the Interim President. The speech urged the inhabitants of Butare to engage in a murderous manhunt by appealing to the populace that "the enemies are among you, get rid of them."[29]

The Civil Defence Program and the Militias

283. In 1994, Rwandan officials controlled the militias and civil defence forces. The militias trained in military camps. During times of unrest or emergency states call such groups into duty to supplement its armed forces. The evidence before the Trial Chamber moreover reveals that both the militias and the civil defence forces programme became an integral part of the machinery carrying out the genocidal plan in 1994.

284. One of the means by which an ordinary Rwandan became involved in the genocide was through the civil defence programme. Initially both Hutus and Tutsis were involved in the civil defence programme. Authorities established the civil defence programme in 1990 for the security of the civilian population, whereby they could arm persons at all administrative levels, from the top of the *prefecture*, down to the cellule. Degni Segui confirmed this scheme during a conversation with Bisimungu, the Chief of Staff of the Armed Forces, the chief of the police and the Commander of the Gendarmerie, during one of his visits to Rwanda. Unfortunately, the civil defence programme was used in 1994 to distribute weapons quickly and ultimately transformed into a mechanism to exterminate Tutsis. Numerous eyewitnesses such as Witnesses C and F confirmed this fact. They testified that they witnessed the distribution of machetes to civilians by the Prefectoral and Communal authorities in early April 1994. Other evidence before this Chamber shows that 50,000 machetes were ordered and distributed through this programme shortly before the commencement of the 1994 massacres, to the militias of the MRND (members of the *Interahamwe*) and CDR (members of the *Impuzamugambi*), and the Hutu civilian population. Degni-Segui concluded that in the end this "system served to kill innocent people, namely Tutsis."[30]

285. Prosecution evidence, including letters from Rwandan authorities confirmed that "the population must remain watchful in order to unmask the enemy and his accomplices and hand them over to the authorities."[31] Witness R who was familiar with the administrative structure of Rwanda in 1994, affirmed that the people were told to "protect themselves within the Cellules and the Sectors," by organising patrols and erecting roadblocks.[32]

286. Other eyewitnesses recounted their versions of the occurrences at the massacre sites and almost all affirmed the presence of members of the *Interahamwe* and other armed civilians. In fact, several witnesses averred that the majority of the attackers were members of the militias and other civilians who were singing songs of extermination as they approached their victims. Several witnesses further stated that most of these attackers carried machetes and other traditional agricultural tools, as opposed to the gendarmes or police who were armed with guns and grenades.

Roadblocks and Identification Cards

287. The perpetrators of the genocide often employed roadblocks to identify their victims. Both Prosecution and Defence witnesses testified to this fact. Degni-Segui testified that within hours of the President's death, the military personnel, soldiers, the members of the *Interahamwe* and armed civilians erected and manned roadblocks. In fact, some roadblocks were erected within thirty to forty-five minutes after the crash of President's plane and remained throughout Rwanda for at least the following three months. According to this witness "what they had to do was to use identity cards to separate the Tutsis from the Hutus. The Tutsis were arrested and thereafter executed, at times, on the spot."[33]

288. De Saint-Exupery confirmed the existence of roadblocks in Rwanda during the time in question. He testified that from Goma to Kibuye on 25 June 1994, "at the approach . . . to each locality, there was a roadblock."[34] Witness Sister Julianne Farrington stated that in May 1994 as she travelled from Butare to Kibuye, she went through 45 roadblocks. She further stated that at some roadblocks military personnel monitored movements, while others were manned by young Hutus in civilian dress. Other witnesses, including witnesses G, T, and Defence witness DA and DM, who travelled through various parts of Rwanda during the genocide, confirmed these facts before this Trial Chamber. The Trial Chamber notes that those who produced identity cards bearing the indication Hutu and those with travel documents were able to pass through these roadblocks without serious difficulties. Conversely, those identified as Tutsis were either arrested or killed. The Trial Chamber recognises that the erection of roadblocks is a natural phenomenon during times of war. However, the roadblocks in Rwanda were unrelated to the military operations. Sadly, they were used to identify the Tutsi victims of the genocide.

Conclusion

289. In summary, the Trial Chamber finds that the massacres of the Tutsi population indeed were "meticulously planned and systematically co-ordinated" by top level Hutu extremists in the former Rwandan government at the time in question.[35] The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of the militias and the Hutu population who had been convinced by these extremists that the Tutsi population, in fact, was the enemy and responsible for the downing of President Habyarimana's airplane.

290. The cruelty with which the attackers killed, wounded and disfigured their victims indicates that the propaganda unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population. The involvement of the peasant population in the massacres was facilitated also by their misplaced belief and confidence in their leadership,[36] and an understanding that the encouragement of the authorities to guaranteed them impunity to kill the Tutsis and loot their property.

291. Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda's total population.[37] These facts combined prove the special intent requirement element of genocide. Moreover, there is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were "members of a group," in this case an ethnic group. In light of this evidence, the Trial Chamber finds a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994.

5.2.1 Genocide in Kibuye

292. Having determined that perpetrators carried out a genocidal plan in Rwanda in 1994, this Chamber now turns to assess the situation in Kibuye *Prefecture*. After the death of the President on 6 April 1994, the relatively calm co-existence of the Hutus and Tutsis came to a halt in Kibuye According to the Prosecutor, Kibuye was among the first of the *prefectures* "to enter into this dance of death."[38] In Kibuye, the first incidents took place on 8 and 9 April 1994 in various *communes*. The Chamber heard testimony and received documentary evidence that the perpetrators of the genocide in Kibuye acted with requisite intent to destroy the Tutsi population in whole or in part and that they in fact succeeded in achieving this goal. In this Chapter , this Chamber examines briefly the occurrences in Kibuye *Prefecture* from April to June 1994.

Background

293. The Chamber finds that events in Kibuye unfolded as follows. After the crash of the President's plane, the atmosphere quickly began to change. The Hutu population began openly to use accusatory or pejorative terms, such as *Inkotanyi* (Kinyarwanda for RPF accomplice/enemy)[39] and *Inyenzi* (Kinyarwanda for cockroach) when referring to the Tutsis. The members of the *Interahamwe* and other armed militant Hutus began a campaign of persecution against the Tutsis based on the victims' education and social prominence. Simultaneously, the Tutsi population, as a whole, suffered indiscriminate attacks in their homes. Perpetrators set on fire their houses and looted and killed their herds of cattle. Witness A testified that on the morning of 7 April 1994 his Hutu neighbours began to engage in looting, attacking Tutsi-owned houses and slaughter Tutsi-owned livestock. Witnesses C, F, OO and E, corroborated these occurrences.

294. On their way to the gathering places many witnesses saw roadblocks where the perpetrators separated Tutsis from the Hutus. Once the Tutsis reached these places they were injured, mutilated and some of the women were raped. In the end the Tutsis were massacred by Hutu assailants who sang songs whose lyrics exhorted extermination during the attacks. These attackers were armed and led by local government officials and other public figures. The fact that these massacres occurred is not in dispute. In fact, Kayishema testified that he and others engaged in a clean-up operation after the massacres.

295. To illustrate implementation of the genocidal plan, the Trial Chamber now turns to examine the occurrences in the commune in Kibuye, immediately following the death of President Habyarimana, and other related issues which serve as further proof, such as meetings and documentary evidence, of the genocidal events in Kibuye.

Initial Attacks at the Residences of the Tutsis

296. There is sufficient evidence to find that in communes such as Gishyita Gitesi, Mabanza and Rutsiro the initial persecution of the Tutsis and individual attacks on their houses began almost immediately after the death of the President. The fact that killings took place throughout Kibuye is corroborated by a diary entry[40] which was tendered by Witness O. Witness O testified that initially after the President's death, in Gitesi Commune, there was relative calm. He also stated, however, that on 7 April "he saw wounded people everywhere, by the roadside, bushes and very close to the administrative headquarters of the *Prefecture*."[41] Witness O, under cross-examination, told the Trial Chamber that the first people to be killed were in Kigali and they were *alleged* to be RPF collaborators. Witness O testified there was a cause-and-effect relationship correlation between the 8 April radio announcement of the purported resumption of the war and the first deaths in Rwanda and, in particular, in Kibuye *Prefecture*.

297. Witness F's testimony is illustrative of many other witnesses and of the situation as a whole. A resident of Gitesi commune, Witness F testified that he heard the news of the crash at 10 a.m. on 7 April and that as a result, the mood of the people changed to one of panic in his neighbourhood. On 7 or 8 April, a meeting took place at Mutekano Bar, situated some 400-500 meters from the Kibuye prison, along the road heading to the Kibuye *Prefecture* Office. Witness F testified during that period, he interacted with one Mathew, who was participating in the said meeting. Witness F observed the meeting, the topic of which was security – addressing the "Tutsi problem" -- from the roadside for about twenty minutes. Many local officials participated in the meeting.

298. Witness F testified that after the meeting of 8 April, he witnessed machetes being distributed by Ndida, the Commune Secretary. The machetes had been transported into the commune by Prefectoral trucks and the Secretary of Gitesi Commune supervised the unloading. They were taken towards the Petrol Rwanda fuel Station. About twenty persons received a machete each including, Eriel Ndida, Rusigera, Siriaki, Emmanuel, the Headmaster and many others. On 9 April, the local officials departed to other commune after the distribution of machetes. That evening around his neighbourhood in Gitesi, Witness F noticed that the situation had changed and that militant Hutus openly were attacking the Tutsi. The proximity of the distribution of weapons to the massacres of Tutsi civilians is evidence of the genocidal plan. He noticed that militant Hutu had begun throwing rocks at Tutsis and throwing some persons into Lake Kivu. He also observed similar acts of violence in Gishyita commune. He stated that some persons from Gishyita crossed Lake Kivu to take refuge in the commune of Gitesi.[42]

299. On 12 April, the first person in Witness F's neighbourhood was killed. Munazi, who was with other militant Hutu and members of the Interahamwe killed Nyirakagando, an elderly Tutsi. Witness F and others saw her dead body in the morning of 13 April, as they were fleeing their homes. Witness F stated that "the Hutus killed her because she was Tutsi."[43] Militant Hutus started by chasing Tutsi men. Witness F stated that "when the Tutsi realised that they were being pursued by the Hutus, they

started to flee through the bushes."[44] Witness F's wife was gang-raped by the Hutus before her children's eyes on 13 April. Witness F's mother "was killed with the use of a spear to her neck" during the same attack.[45] Witness F left his wife who was no longer able to walk and first hid in the bush within sight of his house and on 13 April fled to a Pentecostal church at Bukataye.

300. Witness F spent the night at the church parish at Bukataye. During the night, there was an attack on the church parish, led by the Headmaster of the Pentecostal school. People carrying clubs and spears accompanied the Headmaster of the school. He said, "the Tutsi who were in the Church should come out so that they could be killed."[46] Those who were unable to flee the Church were separated. Tutsi women separated from the Hutu women. The latter remained and watched as the attackers killed the former. Witness F stated that the men, including him, then fled to the bushes.

Mass Movement of the Tutsi Population

301. Witness B testified that, when the attacks began in her commune, she and others decided to flee, stating "we did not want to be killed in our homes, and the people were saying that if you go to the Church no one could be killed there."[47] Witness B along with her mother, young sister and brother as well as four other Tutsis, left their village in Kabongo, Bishura sector, Gitesi commune, for the Catholic Church in Kibuye. As they fled, there were armed Hutus around their home.

302. Because the Tutsis were targets in their homes, they began to flee and seek refuge in traditional safety. Witness T, who worked at the Catholic Church and Home Saint Jean, (the Complex) testified that in the days following the President's death, a curfew was announced and people were told to stay at home. Tutsis, however, began to arrive on the peninsula, where the Complex is located, shortly thereafter. These Tutsis were from the hill of Bururga. Others came from Gitesi, Bishunda, Karongi and Kavi. They had converged at the communal office but they were not allowed to stay. Witness T stated that she helped lodge the thousands refugees, comprised of the elderly, women and children, in the dormitories at the Complex. Those seeking refuge were worried because their homes had been burnt. The first incidents of burning homes started between 7 and 10 April in Burunga, the hill to the left of the Home St. Jean, and other hills nearby. Witness T stated that she saw the home of a friend aflame.

303. Explaining a diary entry from 14 April 1994 to the Trial Chamber, Witness O stated that those seeking refuge from Gitesi Commune, who were on their way to the Stadium, told him that they were fleeing massacres which had begun in their area. Witness O observed many massacres during that time and aided Tutsi survivors to reach Kibuye Hospital.

304. Witness C testified that two days after the President's death people in Burunga, Mabanza commune started fleeing. She testified that attackers were attacking the Tutsi for being Tutsi and

burning their houses. She explained that there was no apparent reason for these attacks besides these persons' ethnicity. Regarding the militant Hutu, she stated that "they themselves really could not find a reason for this because they would share everything on a day-to-day basis."[48] She saw people fleeing from Mabanza, including a member of her extended family, and the family of Nyaribirangwe. Her relative had been dealt a machete blow to his head.

305. Witness B testified that they fled to the Catholic Church "because people like my father who had lived through other periods of unrest as in 1959, when there was an attack against the Tutsi, at that time people took refuge at the Church."[49] Witness T had a similar reason for going to a place of refuge. She testified that since the 1959 revolutions, whenever people felt insecure, they would go to churches, parishes and would be protected and be "respected in these places."[50] Additionally, witness F testified, that they arrived at the Catholic Church on 15 April at about 4 a.m. and found scores of other Tutsis who had come from other commune such as Mabanza, Rutsiro, Kaivere and Gishyita as well as Gisenyi *Prefecture*.

306. Witness A testified that on 7 April, militant Hutu began to attack Tutsi-owned houses, slaughtered Tutsi-owned livestock. The Abakiga (Hutus from the northern region of Rwanda) joined their fellow Hutu: On 12 April 1994, militant Abakiga Hutu identified the Tutsi by identification cards and massacres started in Gatunda shopping area. Witness A went to the Catholic Church, arrived 13 April between 6 and 7 a.m., and found numerous refugees gathered there.

307. Almost all Prosecution and Defence witness, including Mrs. Kayishema, who travelled throughout Kibuye *Prefecture*, testified that they encountered roadblocks. At these roadblocks the attackers used identification cards to distinguish between and to separate Hutus from Tutsis.

Other Evidence of Intent to Commit Genocide

308. The record in the present case is replete with evidence that reveals the existence of a plan to destroy the Rwandan Tutsi population in 1994. The Trial Chamber explores briefly some of the more pertinent evidence relative to the acts demonstrating the intent to commit genocide that took place in Kibuye *Prefecture*.

309. Evidence presented to the Chamber shows that in Kibuye *Prefecture* the massacres were pre-arranged. For months before the commencement of the massacres, *bourgmestres* were communicating lists of suspected RPF members and supporters from their commune to the *Prefect*.[51] In addition, the Prosecutor produced a series of written communications between the Central Authorities,[52] Kayishema and the Communal Authorities that contain language regarding whether "work has begun" and whether more "workers" were needed in certain commune.[53] Another letter sent by Kayishema to the Minister of Defence requested military hardware and reinforcement to undertake clean-up efforts

in Bisesero.[54]

310. Some of the most brutal massacres occurred after meetings organized by the *Prefectoral* authorities and attended by the heads of the Rwandan interim government and/or ordinary citizens of the *prefecture* to discuss matters of "security."[55] During one of these meetings Kayishema was heard requesting reinforcement from the central authorities to deal with the security problem in Bisesero. Witness O testified that on 3 May 1994, Interim Governmental Prime Minister Jean Kambanda visited Kibuye *prefecture* with a number of other officials, including Ministers of Interior, Information, and Finance, the *Prefect* of Kibuye, and the General Secretary of MDR party. Witness O attended a meeting with these and other officials in his capacity as an official of Kibuye hospital and voiced his concern regarding seventy-two Tutsi children who survived the massacre at the Complex and were in poor physical condition at Kibuye hospital. Members of the *Interahamwe* had threatened these children, aged between 8 and 15 years. The Prime Minister did not personally respond to Witness O's concern, but asked the Minister of Information to do so. That minister rebuked Witness O, remarking that he should not protect people who don't want to be protected. He also declared that Witness O obviously did not approve of the politics of the Interim Government, and could not recognize the enemy. The Minister of Information gave the impression that the Interim Government recognized these infirm children as enemies. Later, these children were forcibly taken from the hospital and killed.

311. Sister Farrington testified to having witnessed the discriminatory attitude of various Kibuye authorities towards all Tutsis. During the occurrences Sister Farrington went to Kibuye Prefectoral offices to inquire about obtaining a *laissez-passer* that would allow some of the nuns from her convent to leave Rwanda. Over a period of three days she spoke with the Sous-*prefect*, Gashangore as well as Kayishema. Gashangore used hostile language when referring to Tutsis and accused specific people in the *Prefecture* of being "central to the activities of the *Inkontany*." During another attempt to obtain help, Sister Farrington spoke with Kayishema in his office where he spoke to her in an agitated and aggressive tone. Kayishema told her that there was a war prepared by the *Inkotanyi*, and the Tutsi people were collaborators of the enemy. As proof he showed her a list of names of people, maps and other documents allegedly preparing Tutsis to become revolutionaries.

Conclusion

312. Considering this evidence, the Trial Chamber finds that, in Kibuye *Prefecture*, the plan of genocide was implemented by the public officials. Persons in positions of authority used hate speech and mobilised their subordinates, such as the gendarmes the communal police, and the militias, who in turn assisted in the mobilisation of the Hutu population to the massacre sites where the killings took place. Tutsis were killed, based on their ethnicity, first in their homes and when they attempted to flee to perceived safe havens they were stopped at roadblocks and some were killed on the spot. Those who arrived at churches and stadiums were attacked and as a result tens of thousands perished.

313. Having examined the reasons why Tutsis gathered at the four massacre sites, the Trial Chamber now examines the evidence specific to these sites and the role, if any, of the accused Kayishema, and his subordinates, as well as that of Ruzindana in the alleged crimes.

5.3 AN INTRODUCTION: THE MASSACRES AT THE CATHOLIC CHURCH AND HOME SAINT-JEAN COMPLEX, STADIUM IN KIBUYE TOWN AND THE CHURCH IN MUBUGA

314. This Chapter addresses the occurences common to the first three massacre sites in the Indictment namely, the Catholic Church and Home Saint-Jean Complex (Complex), located in Kibuye the Stadium in Kibuye (Stadium), and the Church in Mubuga (Mubuga Church), in Gishyita commune. This introduction does not include the fourth massacre site, Bisesero area, because the masscres in that area followed a slightly different pattern and took place over a much longer period of time than the first three sites. Additionally, under this Indictment, the Bisesro charges include both accused persons where as the first three sites concern Kayishema only. A summary of the witness testimonies for the first three sites paints the following picture.

315. In mid-April 1994, Tutsi seeking refuge from various communes converged on the three sites in order to escape atrocities perpetrated by the Hutus against the Tutsis. Throughout Kibuye *Prefecture*, Tutsis were being attacked, their houses set ablaze and cattle looted or slaughtered. Historically, community centres such as the Churches and the Stadium were regarded as safe havens where people gathered for protection in times of unrest; this was the case in April 1994. Many witnesses testified that they went to these sites with the belief that the prefectorial authorities would protect them. By the time some Tutsi reached the churches they were overflowing and these people continued on to the Stadium, often under the instruction of the gendarmes and local officials. By all accounts, very large numbers of Tutsis amassed in each of the three sites. Estimates varied from 4,000 to over 5,500 at Mubuga, about 8,000 at the Complex and, 5,000 to 27,000 at the Stadium.

316. At all three sites, gendarmes guarded the entrances or completely surrounded the structure. The gendarmes controlled the congregation, maintaining order or preventing people from leaving. Witnesses testified that Tutsi who attempted to exit were killed by armed Hutu assailants. Conditions inside the massacre sites became desperate, particularly for the weak and wounded. The authorities did not provide food, water or medical aid and, when supplies were offered, the Gendarmes prevented them from reaching the Tutsis.

317. With thousands of internally displaced persons (hereinafter refugees)[56] effectively imprisoned at the three sites in Kibuye, five days of almost continuous massacres commenced. First, at Mubuga Church the major killing started on 15 April and continued on 16 April. On 15 and 16 April the Complex suffered preliminary attacks followed by a major slaughter on 17 April. On 18 April, the massacre at the Stadium began with the attackers returning on 19 April to complete the job. Evidence before the Trial Chamber suggests that thousands of Tutsi seeking refuge were killed during these few days.

318. Testimony reveals striking similarities in the assailants' methods both during the initial gathering of Tutsis and later during the execution of the massacres. Some of those seeking refuge assembled at the three sites had done so owing to encouragement by Hutu officials. Initially, the gendarmes appeared merely to be maintaining order and allowed people to leave the Churches or Stadium to find food or water. Soon thereafter, however, authorities cut off supplies and prevented those seeking refuge from leaving. Those who attempted to leave were either chased back inside the structure or were killed by the armed attackers while the gendarmes watched. At this stage gendarmes and/or the members of the *Interahamwe* surrounded the Churches and at the Stadium gendarmes guarded the entrances. These conditions of siege soon turned into massive attacks by Gendarmes, communal police, prison wardens, the members of the *Interahamwe* and other armed civilians. Having surrounded the site, they usually waited for the order from an authority figure to begin the assault. The massacres started with the assailants throwing grenades, tear gas, flaming tires into the structure, or simply shooting into the crowds. Those who tried to escape were killed with traditional weapons. Following these hours of slaughter, the attackers would enter the building or Stadium carrying crude traditional weapons and kill those remaining alive.

319. The above background facts for the most part, are not refuted and the Trial Chamber finds ample evidence to support this general picture of events. The real issue for the Trial Chamber is the role, if any, played by Kayishema and/or those under his command or control, at the three crime sites. The Prosecution alleges that Kayishema was present, participated and led others at all three massacre sites. Kayishema admitted that he visited the sites when Tutsi were congregated but prior to the massacres to assess the situation. Kayishema, however, denies his presence during the days of attack. Indeed, Kayishema's alibi states that he was in hiding during the times of the massacres[57] because his life was under threat. He claims to have been hiding from the morning of 16 April through 20 April, coming out on the morning of 20 April.

320. Evidence shows that others saw Kayishema at the three sites during the period of 14 to 18 April. On 14 April Kayishema stated that he visited Mubuga Church, but only to monitor the situation. Testimony, however, places Kayishema at Mubuga in the morning, of 15 April and at the Complex at 3 p.m. in the afternoon. The evidence suggests that the two churches are approximately 40 kilometres apart by road. Again, on 16 April, Kayishema was seen in the morning at Mubuga during the start of the attack and then at the Complex during the preliminary acts of violence. The following day, 17 April, witnesses testified that Kayishema was present at the Complex and played a pivotal role in the massive slaughter of that day. Lastly, Kayishema is said to have initiated the massacre at the Stadium on 18 April. The Trial Chamber now turns to separately assess the evidence for each of the four massacre sites enumerated in the Indictment.

ANNEX 9

Security Council Resolution 1315

United Nations S/RES/1315 (2000)

Security Council

Distr.: General
14 August 2000

Resolution 1315 (2000)

Adopted by the Security Council at its 4186th meeting, on 14 August 2000

The Security Council:

Deeply concerned at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity,

Commending the efforts of the Government of Sierra Leone and the Economic Community of West African States (ECOWAS) to bring lasting peace to Sierra Leone,

Noting that the Heads of State and Government of ECOWAS agreed at the 23rd Summit of the Organization in Abuja on 28 and 29 May 2000 to dispatch a regional investigation of the resumption of hostilities,

Noting also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law,

Recalling that the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law,

Reaffirming the importance of compliance with international humanitarian law, and *reaffirming further* that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Taking note in this regard of the letter dated 12 June 2000 from the President of Sierra Leone to the Secretary-General and the Suggested Framework attached to it (S/2000/786, annex),

Recognizing further the desire of the Government of Sierra Leone for assistance from the United Nations in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace,

Noting the report of the Secretary-General of 31 July 2000 (S/2000/751) and, in particular, *taking note* with appreciation of the steps already taken by the Secretary-General in response to the request of the Government of Sierra Leone to assist it in establishing a special court,

Noting further the negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone,

Acknowledging the important contribution that can be made to this effort by qualified persons from West African States, the Commonwealth, other Member States of the United Nations and international organizations, to expedite the process of bringing justice and reconciliation to Sierra Leone and the region,

Reiterating that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region,

1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, and *expresses* its readiness to take further steps expeditiously upon receiving and reviewing the report of the Secretary-General referred to in paragraph 6 below;

2. *Recommends* that the subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone;

3. *Recommends further* that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone;

4. *Emphasizes* the importance of ensuring the impartiality, independence and credibility of the process, in particular with regard to the status of the judges and the prosecutors;

5. *Requests*, in this connection, that the Secretary-General, if necessary, send a team of experts to Sierra Leone as may be required to prepare the report referred to in paragraph 6 below;

6. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution, in particular on his consultations and negotiations with the Government of Sierra Leone concerning the establishment of the special court, including recommendations, no later than 30 days from the date of this resolution;

7. *Requests* the Secretary-General to address in his report the questions of the temporal jurisdiction of the special court, an appeals process including the advisability, feasibility, and appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and Rwanda or other effective options, and a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require;

8. *Requests* the Secretary-General to include recommendations on the following:

(a) any additional agreements that may be required for the provision of the international assistance which will be necessary for the establishment and functioning of the special court;

(b) the level of participation, support and technical assistance of qualified persons from Member States of the United Nations, including in particular, member States of ECOWAS and the Commonwealth, and from the United Nations Mission in Sierra Leone that will be necessary for the efficient, independent and impartial functioning of the special court;

(c) the amount of voluntary contributions, as appropriate, of funds, equipment and services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations;

(d) whether the special court could receive, as necessary and feasible, expertise and advice from the International Criminal Tribunals for the Former Yugoslavia and Rwanda;

9. *Decides* to remain actively seized of the matter.

ANNEX 10

Charter of the International Military Tribunal at Nuremberg, Article 21.

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17.

The Tribunal shall have the power

(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them

(b) to interrogate any Defendant,

(c) to require the production of documents and other evidentiary material,

(d) to administer oaths to witnesses,

(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18.

The Tribunal shall

(a) confine the Trial strictly to an expeditious hearing of the cases raised by the charges,

(b) take strict measures to prevent any action which will cause reasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19.

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value.

Article 20.

The Tribunal may require to be informed of the nature of any evidence before it

is entered so that it may rule upon the relevance thereof.

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.

Article 22.

The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23.

One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24.

The proceedings at the Trial shall take the following course:

(a) The **Indictment** shall be read in court.

(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty."

(c) The prosecution shall make an opening statement.

(d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.

(f) The Tribunal may put any question to any witness and to any defendant, at any time.

(g) The Prosecution and the Defense shall interrogate and may crossexamine any witnesses and any Defendant who gives testimony.

(h) The Defense shall address the court.

(i) The Prosecution shall address the court.

(j) Each Defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver **judgment** and pronounce **sentence.**

Article 25.

All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal is sitting, as the Tribunal considers desirable in the interests of the justice and public opinion.

ANNEX 11

Prosecutor v. Bagosora et al., ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 Sept. 2003, para. 18.

TRIAL CHAMBER I

Before:
Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 18 September 2003

THE PROSECUTOR
v.
Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSIBILITY OF PROPOSED TESTIMONY OF WITNESS DBY

The Office of the Prosecutor
Barbara Mulvaney
Drew White
Segun Jegede
Alex Obote-Odora
Christine Graham
Rashid Rashid

Counsel for the Defence
Raphaël Constant
Paul Skolnik
Jean Yaovi Degli
David Martin Sperry
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the objections by the Defence to proposed testimony of Witness DBY, made

orally on 12 September 2003;

CONSIDERING the "Joint Defence Brief Regarding the Admissibility of Evidence of Criminal Acts Alleged to Have Been Committed By the Accused Outside the Period of the Trial Chamber's Temporal Jurisdiction", filed on 15 September 2003; and the Prosecution "Response" thereto, filed on 15 September 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 12 September 2003, Prosecution Witness DBY appeared before the Chamber to testify. Based upon a witness statement taken on 2 and 3 December 1999 and the theme of questions being posed by the Prosecution, it became apparent that the witness was about to give testimony concerning actions of the Accused before 1 January 1994.[1] The Defence objected to the testimony, and requested the Chamber to rule it inadmissible and to direct that the testimony not be heard. In response to questions from the Bench, the Prosecution indicated a series of different topics in the witness statement on which it intended to elicit testimony:

> Category I: Orders and actions of Defendant Ntabakuze on four specific occasions: 3, 5, and 9 October 1990 and some date in January 1991; on one of these occasions, 5 October 1990, the Defendant Bagosora is also identified as having engaged in the same actions as Ntabakuze;
>
> Category II: A telegram seen by Witness DBY at the end of 1992 or beginning of 1993 sent by the Defendant Bagosora identifying Tutsi as the enemy and leading to the dismissal of Tutsi from the army;
>
> Category III: A telegram seen by the witness in 1992 sent by Defendant Bagosora requesting delivery of weapons to the Ministry of Defence for distribution, which the witness later saw in the possession of *interahamwe*.

SUBMISSIONS

2. The Prosecution acknowledges that, in accordance with the temporal jurisdiction of the Tribunal, the indictments charge the Accused with crimes committed between 1 January and 31 December 1994. [2] Placing reliance on a Separate Opinion of Judge Shahabudeen in the *Media* case, the Prosecution nevertheless argues that evidence of events prior to that period is admissible to prove the commission of those crimes in 1994. Evidence of events prior to 1 January 1994 may be admitted for one of three purposes: as proof of "ongoing criminal conduct which culminates in 1994"; to place the events of 1994 in their proper context; and under the rubric of "similar fact evidence, as authorised specifically by Rule 93".[3] These submissions are discussed in more detail in the Deliberations section below. In respect of the first purpose, the Prosecution claims in particular that the evidence is probative of an ongoing conspiracy of indeterminate length that existed at the time of the events in 1990.

3. The Defence argues that the Prosecution's reliance on Judge Shahabuddeen's Opinion is misplaced. Rather than addressing the admissibility of evidence of pre-1994 events, that opinion decided only that pre-1994 incidents may be mentioned in an indictment without ruling on the admissibility of such evidence; the question of admissibility of evidence was identified as a distinct issue for the Trial Chamber.[4] Even if evidence of pre-1994 events may, in principle, be admitted, Witness DBY's

testimony does not meet the criteria for admission set forth in Rule 89(C) or Rule 93 of the Rules of Procedure and Evidence ("the Rules"). The evidence is neither relevant nor probative of any facts in issue in this case. Further, the evidence is highly prejudicial as it suggests the bad character of the accused. Any probative value that might exist is outweighed by the improper prejudice caused to the Accused. Rule 93 gives the Prosecution no licence to extend the temporal range of events which it may tender and, in any event, should only exceptionally permit the admission of otherwise inadmissible evidence. Finally, the Defence argues that admission of this testimony will greatly complicate and lengthen the trial as it will be obliged to contest these events.

DELIBERATIONS

General Principles

4. Rule 89(C) provides that a Chamber "may admit any relevant evidence which it deems to have probative value". This simple formulation sets out three distinct aspects of the process of determining admissibility. First, the evidence must be in some way relevant to an element of a crime with which the Accused is charged. Second, the evidence must have some value in proving the elements of the crimes with which an Accused is charged. The separate reference to "probative value", and to the requirement that the Chamber must "deem" that the evidence has that quality, suggests that probative value is a different and more complex hurdle than relevance. Third, even where these two criteria are met, Rule 89 (C) does not command, but merely permits, admission of the evidence.

5. The issue confronting the Chamber concerns a particular type of relevance: whether testimonial evidence of a witness concerning events prior to 1994 is relevant to, and probative of, charges of crimes committed only within that year.

6. The jurisprudence of the Tribunal on this particular question is limited. However, a discussion of general principles is to be found in decisions in the *Media* case which addressed whether events prior to 1994 – that is, prior to the temporal jurisdiction of the Tribunal -- may be recounted in an indictment.[5] The Trial Chamber ruled that:

> information that falls outside of the temporal jurisdiction of the Tribunal may be useful in helping the accused and the Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994. Furthermore the Chamber is of the view that the proper stage to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events that occurred prior to 1 January 1994, is during the assessment of evidence.[6]

That decision was upheld by the Appeals Chamber, which confirmed that the indictment did not purport to charge the Accused with crimes committed prior to 1994, but merely to provide an introduction, and historical background and context, to the crimes committed in 1994. Two separate opinions were filed along with the decision of the Appeals Chamber, of which that of Judge Shahabuddeen is of particular assistance to the question of the admissibility of evidence of pre-1994 events. His principal concern was the jurisdictional question, but in so doing he rejected the assertion that pre-1994 events are categorically irrelevant to crimes within the jurisdiction of the Tribunal:

> But there is a distinction between the legal elements of a crime and and the evidence of their existence. The prosecution has to prove that all the legal elements of a crime were present at the time of commission of the crime, that is to say, at the time within the mandate year when the crime is alleged to have been committed. However, there is no reason why the

> evidence of their existence at that point in time cannot (in some cases, at any rate) include evidence deriving from a time prior to the commencement of the mandate year.[7]

7. Having so found, Judge Shahabuddeen specifically disclaimed ruling on the admissibility of any particular evidence that might be tendered at trial:

> My holding is only that the amended indictment does not charge the appellant with any crimes committed before the commencement of the mandate year. That holding does not exclude the competence of the Trial Chamber in the course of the actual trial from shutting out evidence of previous crimes on the ground that, in the circumstances of the case, the particular evidence *is not in fact relevant or that, if it is, its prejudicial effect on the accused exceeds its probative value. That is an evidentiary issue, not a jurisdictional one*....[8]

8. Evidence of events prior to 1 January 1994 is not clearly separated from crimes charged in the indictment. Such events may be relevant to, and probative of, the commission of crimes in 1994. In deciding the jurisdictional question, Judge Shahabuddeen sets out three possible avenues, all of which have been invoked by the Prosecution, by which evidence of such events may properly be considered relevant. These three bases of relevance are discussed at the outset, before considering the probative value of the specific evidence tendered, or whether its value is outweighed by its prejudicial effect.

i) Evidence Relevant to an Offence Continuing Into the Mandate Year

9. The Prosecution does not exceed its mandate by charging an individual with an offence that begins at some date prior to 1994, but continues into that year. In respect of conspiracy, "the charge could correctly be for a conspiracy made in, or continuing into, the mandate year even though the original conspiracy agreement was made prior thereto".[9] Accordingly, evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible. The Prosecution claims generally that Witness DBY's testimony is relevant to the existence of a conspiracy that commenced before 1994 and continued into that year.

ii) Context or Background

10. Where an event is not itself part of the crime charged, but without which "'the account...would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence'".[10] Evidence of the nature of the relationship between a victim and an accused, and possible motives for the commission of a crime, may be admitted on this basis.[11] Establishing motive may also be relevant to *mens rea*. Judge Shahabuddeen noted that this category should be viewed broadly, in light of the "scale of events, in space and time", and the fact that prejudicial background information will be less damaging when heard by professional judges than a jury.[12]

(iii) "Similar Fact Evidence"

11. The third avenue for admission of evidence of pre-1994 events is based on an exception, long-established in the common law, for admitting evidence of particular category of acts committed prior to the time of the act which is charged.

12. The exception can only be described in relation to the general rule. A long-standing principle of common law jurisdictions, adopted by the International Criminal Tribunal for Yugoslavia, is that "as a

general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith."[13] This means that prior criminal offences by the accused – even of precisely the same offence with which the accused is charged – are not admissible if the only purpose for their introduction is to establish that the accused was capable of committing the offence, is inclined to commit the offence, or on some prior occasion actually did have the intent to commit the criminal offence. Such evidence is excluded because the evidence may so severely blacken the reputation of the accused as to make acquittal virtually impossible, even though the direct evidence of the commission of the offence is weak. Further, dealing with evidence of past conduct may be unduly distracting and time-consuming, leading to an unfocused trial that undermines the truth-finding function.[14]

13. The definition of similar fact evidence in the Shahabuddeen Opinion is taken from an Australian case:

> '[I]f the evidence of the other offence or offences goes beyond showing a mere disposition to commit crime or a particular kind of crime and points in some other way to the commission of the offence in question, then it will be admissible if its probative value for that purpose outweighs or transcends its merely prejudicial effect. The cases in which similar fact evidence may have sufficient additional relevance to make it admissible are not confined, but recognized instances occur where the evidence is relevant to prove intent, or to disprove accident or mistake, to prove identity or to disprove innocent associations....'[15]

Shahabuddeen's gloss on this passage is that "evidence of prior offences is admissible to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense."[16]

14. Other discussions of similar fact evidence explain that it is admissible because it reveals a propensity that "'is so highly distinctive or unique as to constitute a signature'".[17] In such cases, the evidence is of type which is not probative of merely a general propensity to commit the criminal act, but is probative of some peculiar feature of the case which substantially enhances its probative value in relation to the charge. Defining what type of evidence is sufficiently specific so as to migrate out of the prohibited zone of general propensity evidence, is a difficult exercise which depends on the facts of each case. The prejudicial effect on the character of the accused must also be considered, and whether the prosecution can achieve its stated object using less prejudicial evidence.[18]

iv) Probative Value and Prejudice

15. Probative value is a second criterion of admissibility set out in Rule 89(C). It has been described simply as "'evidence that tends to prove an issue'" and is sometimes conceived as overlapping with the concept of relevance: "For one fact to be relevant to another, there must be a connection or a nexus between the two which makes it possible to infer the existence of one from the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."[19]

16. Though not expressly mentioned in Rule 89, prejudice is also relevant to the determination of admissibility.[20] It is clear from Judge Shahabuddeen's Opinion in the *Media* case that relevant and probative evidence may be excluded on the grounds of "prejudice":

> It being recognised that all relevant prosecution evidence is prejudicial to the accused and the more probative the more prejudicial, still it is possible in some cases to say that the

probative value of the particular evidence is outweighed by its prejudicial effect; in such a case the evidence is to be excluded.[21]

17. Evidence of past crimes, introduced merely to blacken the character of the Accused and show a propensity and capacity to commit the crimes charged, is improper. This is so because the damning effect of the evidence tends to outweigh its true probative value and to obscure more direct evidence of the crime alleged. In this sense, the evidence is "prejudicial" in a manner that compels exclusion.

18. Relevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment. The nature of this evaluation explains the discretion conferred on the Trial Chamber by Rule 89(C).

Application of General Principles to the Evidence of Witness DBY

19. The Prosecution accepts that the charges against the Accused concern crimes committed between 1 January and 31 December 1994.[22] The sole issue confronting the Chamber here is whether evidence of events prior to that period is relevant to those alleged crimes, and whether the probative value of that evidence outweighs its prejudicial effect on the assessment of the crimes alleged.

i) Ongoing Criminal Offence

20. On the basis of the case law summarized above (para. 9), it is the view of the Chamber that evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible.[23] The Prosecution claims generally that Witness DBY's testimony is probative of the existence of a conspiracy that continued into 1994 and should be admitted on that basis.

21. The purported evidence in Category III is plainly relevant and admissible on this ground. It is alleged that one of the Accused requested weapons in 1992 for distribution to militia, which are alleged to subsequently have been seen in the possession of militia and used to commit criminal acts in 1994. The evidence may tend to show the existence of an ongoing criminal plan; the existence of an armed militia in 1994 and its relationship with the military; and the militia's relationship with the Accused and his individual criminal responsibility for their acts. Of course, none of these conclusions have yet been proven, and the Chamber is making no assessment here of the reliability or credibility of the evidence. The standard for admissibility, however, is simply that the evidence is relevant and has the prospect of probative value. This evidence satisfies both of these conditions and does not improperly prejudice the Accused.

22. The relevance of the evidence in Category II is difficult to assess under this heading, and is deferred to the next section, concerning background evidence.

23. The evidence in Category I relates to orders given, and actions taken, by the Accused Ntabakuze and Bagosora on occasions in October 1990 and January 1991. According to the Prosecution, this is relevant to and tends to prove the existence of a conspiracy that continued from October 1990 through the events of 1994.[24] The Defence has pointed to passages from the testimony of the Prosecution's own expert witness, Alison Des Forges, which seem to contradict that contention. In response, the Prosecution quoted Dr. Des Forges's testimony that she refused "to be pinned down to a single date," but stopped short of repeating its claim that a conspiracy existed in 1990 in respect of which the evidence is probative.[25]

24. The Chamber recalls that Dr. Des Forges stated her position as follows:

> "Q.: Now a certain witness in the *Akayesu* case, Professor Filip Reyntjens, commenting on these events suggested that there had been a trial run, a trial-run to the massacres that happened in 1994. Do you agree with that; in other words, a dress rehearsal of the 1994 genocide; would you agree with that assessment? A.: To make that assessment requires a conclusion that from the very beginning, that is, from 1990, it was foreseen that these various smaller attacks could and probably would lead to a larger scale genocide. I have said that I myself do not support the idea that this idea of genocide or a plan of genocide was clearly established in October 1990. So I would prefer to say that it appears there was a pattern of learning and finding which elements work and then using them again the next time, rather than setting out from the start in 1990 with the notion of dress rehearsals to arrive at a final grand performance that one knew would come one day."[26]

25. Whether a conspiracy existed in October 1990 in which the Accused participated is, of course, a matter that can only be assessed after hearing the totality of the evidence. The issue here is not whether there is evidence already heard in the trial that establishes (or negates) the existence of the conspiracy, but rather whether a sufficient nexus of relevance and probativeness connects the evidence with the crime alleged. This involves comparing the evidence tendered with the specific crime alleged.

26. The connection between the proffered evidence and the crime alleged is tenuous. The events of October 1990 and January 1991 to which Witness DBY wishes to testify are said to occur in the context of repelling an invading military force from Uganda. The specific evidence here concerning the Accused Ntabakuze is that (a) on 3 October 2003 he issued an order to shoot anyone seen along a certain road in the area of military activities; (b) that on 5 October 1990, in the vicinity of Kigali, along with the Accused Bagosora, he ordered his men to arrest anyone without an identity card and "all suspicious looking Tutsis", and that some of these suspects were later beaten to death; (c) that Ntabakuze himself participated in these arrests on 5 October 1990 and appeared to use a list; (d) that on 9 October he ordered farms to be destroyed and civilians killed on the basis of a suspicion that they were aiding the invading force; and (e) that in January 1991 he ordered the execution of prisoners, both Hutu and Tutsi, who had been released from a Rwandan prison by the invading force.

27. What is required for admission is that the evidence, either on its own or viewed in the light of other evidence, be probative of a conspiracy. The Prosecution has not explained with particularity how these pieces of evidence show the existence of a conspiracy in 1990 to commit the criminal acts that were allegedly committed by the Accused in 1994. The Prosecution made no such claim or argument in its written submissions.[27] Such a connection would be obvious if, for example, the testimony concerned the content of a conspiratorial agreement; meetings at which an agreement was made; references by individuals to the existence of an agreement; or patterns of conduct showing that individuals were acting in accordance with the terms of some agreement. In light of the absence of a foundation for the contention – and, indeed, the contrary testimony in this regard from Dr. Des Forges – that an ongoing conspiracy existed in 1990, the Prosecution has failed to make the requisite showing of relevance or probative value of *this particular* evidence to a conspiracy that continues through 1994. However, the Chamber accepts item (c) as admissible, because the drawing up of lists may imply some sort of concerted preparation by several individuals and it cannot, at this stage of the proceedings, be ruled out that further evidence may place this incident in context.

28. Any probative value that the evidence may have is outweighed by its serious prejudicial effect. Four of the five events to which Witness DBY will testify concern allegations that the Accused Ntabakuze committed the very same acts – killings of civilians – which form the basis of the charges in the indictment, but with which he is not charged because of the temporal jurisdiction of the Tribunal.

The Accused must be found guilty on the basis of evidence of the crimes charged, not on the basis of evidence that he committed the offence on prior occasions and, therefore, had a propensity to commit them again.[28] It is true that Chambers composed of professional judges may be less susceptible to distraction or prejudice by the admission of irrelevant or prejudicial evidence than juries.[29] But hearing extensive examination and cross-examination on the evidence in question would distract the Chamber from the proper focus of the trial, namely, the events charged in the indictment, and lengthen the trial.

29. Accordingly, the Category I evidence, concerning the orders to kill civilians and destroy the property by Ntabakuze in October 1990 and January 1991, and the arrests and killings of civilians by Ntabakuze and Bagosora on 5 October 1990, is not admissible on the basis of proof of an ongoing offence.

(ii) Context or Background

30. The evidence in Category II should be admitted as background evidence (see para. 10 above). Witness DBY is expected to testify that he saw a telegram from one of the Accused to military units which identified the Tutsi as the enemy because they were providing information to the RPF; requested that the Tutsi be "localised"; and that all Tutsi should be dismissed from the army.

31. The information is relevant to the Accused's relationship with the Tutsi as a group. It may tend to establish motives for acts that he is alleged to have committed in 1994, although the probative value at this stage is still difficult to weigh. The information is not unduly prejudicial as it does not describe any prior criminal acts charged in the indictment. The Chamber reiterates that none of the inferences that the Prosecution intends to establish are proven and that the Accused is, of course, entitled to offer explanations for these statements that negate such inference. The only issue before the Chamber now is whether the evidence should be heard.

32. The information concerning dismissal of Tutsi from the army is also relevant as an explanation of the ethnic composition of the military as it may have existed in 1994. That ethnic composition is a background fact which may assist the Chamber in understanding the milieu in which the Accused were operating. Their role in shaping that military is also helpful to the Chamber and is not significantly prejudicial.

33. The Chamber further observes that evidence of military operations in 1990 and 1991 can be relevant as background evidence. Such evidence may offer the Chamber a broader understanding of the relationship between Tutsi and Hutu as it existed in 1994, and the social and institutional context of the Accused and the military. The positions and actions of the Accused within that hierarchy before 1994 are also admissible as background.

34. However, the Prosecution may not lead evidence of the specific allegations contained in Category I as background evidence. The narrative of events would not be "incomplete or incomprehensible" without this evidence. It has not been shown that these specific incidents serve the purposes claimed by the Prosecution: to illuminate the military command structure; how orders within that command structure were given and executed; or the mechanisms of military discipline in the Rwandan army. Whatever small probative value there may be is outweighed by the improper prejudice that would be caused to the Accused by permitting evidence of these past criminal acts, up to four years before the events in 1994, with which they are not charged.[30]

(iii) Prior Acts and "Similar Fact Evidence"

35. As previously discussed (see paras. 11-14), the prior commission of the acts with which a Defendant is charged are inadmissible if the purpose for their introduction is to show a general propensity or disposition to commit the acts. This does not preclude the introduction of such evidence for other valid purposes, if those purposes exist, and if they outweigh the prejudicial effect of the evidence. In such cases, the direct link between the prior act and the act charged is said to reverse the usual balance of probative value and prejudicial effect in favour of the former.

36. The Prosecution argues that the Category I evidence should be admitted as similar fact evidence, which is said to be liberally permitted under Rule 93.

37. At the outset, the Chamber rejects the view that Rule 93 broadly authorizes the admission of evidence of prior criminal acts that are the same as acts alleged in the indictment. "Pattern of conduct" has generally not been used to introduce evidence of crimes not alleged in the indictment, but has rather been used as the basis for inferences of intent from actions which *are* alleged in the indictment.[31] Based on these precedents, there is reason to believe that Rule 93 has little to say about the general standard of relevance and probativeness set out as the basic test of admissibility in Rule 89(C).

38. The Chamber is of the view that the similar fact evidence exception is not satisfied in this case. No indication has been given as to why these incidents are an exceptional, unique, or peculiar form of the criminal act alleged so as to make it highly probative of the acts alleged in the indictment. On the other side of the scale, these events severely blacken the character of the accused and imply a propensity to commit the acts. The following factors mentioned in a leading Canadian decision, *R v. Handy*, on whether to admit evidence as similar fact evidence, are relevant here:

(1) proximity in time of the similar acts;

(2) extent to which the other acts are similar in detail to the charged conduct;

(3) number of occurrences of the similar acts;

(4) any distinctive feature(s) unifying the incidents;

(5) intervening events;

(6) any other factor which would tend to support or rebut the underlying unity of the similar acts.[32]

These factors must then be weighed against the likely prejudice to the Accused, including the "inflammatory nature of the similar acts and whether the [Prosecution] can prove its point with less prejudicial evidence", and potential for distraction of the court.[33]

39. Without reviewing the many decisions from national systems in which evidence has been introduced under the "similar fact" exception, there is little doubt that the evidence tendered by the Prosecution in Category I does not come close to meeting the criteria for admission. The Prosecution has not identified with sufficient particularity the distinctive or unique features of this evidence, or what it might prove *other than* that the Accused committed the same offence on prior occasions. The evidence has low probative value, but has substantial prejudicial effect for reasons already discussed. This evidence does not qualify as similar fact evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS THE MOTION IN PART

DECLARES inadmissible the proposed testimony of Witness DBY that (a) on 3 October 1990, the Accused Ntabakuze issued an order to shoot anyone seen along a certain road in the area of military activities; (b) on 5 October 1990, in the vicinity of Kigali, along with the Accused Bagosora, Ntabakuze ordered his men to arrest anyone without an identity card and "all suspicious looking Tutsis" and that some of these suspects were later beaten to death; (c) on 9 October Ntabakuze ordered farms to be destroyed and civilians killed on the basis of a suspicion that they were aiding the invading force; and (d) in January 1991 Ntabakuze ordered that prisoners, both Hutu and Tutsi, who had been released from a Rwandan prison by the invading force be executed.

DECLARES admissible the proposed testimony of Witness DBY in respect of: that Ntabakuze participated in arrests on 5 October 1990 and appeared to use a list; a telegram seen by the witness at the end of 1992 or beginning of 1993 sent by the Bagosora identifying Tutsi as the enemy and leading to the dismissal of Tutsi from the army; a telegram seen by the witness in 1992 sent by Bagosora requesting delivery of weapons to the Ministry of Defence for distribution, which the witness later saw in the possession of *interahamwe*; general evidence concerning events in 1990 and 1991, including the general role of the Accused, but without touching on the prohibited evidence as described above.

Arusha, 18 September 2003

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

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[1] The witness statement is identified as "DBY-1".

[2] As the criteria for admission of evidence under Rule 89(C), discussed *infra*, depend on the purposes for which it is tendered, it is convenient to set out the Prosecution's submissions first.

[3] *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Prosecution Response, 15 September 2003, p. 6 ("Prosecution Response").

[4] *Prosecutor v. Hassan Ngeze and Ferdinand Nahimana*, Décision sur les appels interlocutoires, Separate Opinion of Judge Shahabuddeen, 5 September 2000 ("Shahabuddeen Opinion").

[5] Article 1 of the Statute states, in relevant part: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed...between 1 January 1994 and 31 December 1994...."

[6] *Prosecutor v. Ferdinand Nahimana*, Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence, 12 July 2000, p. 4. See also *Prosecutor v. Ferdinand Nahimana*, Decision on the Prosecutor's Request for Leave to File and Amended Indictment, 5 November 1999, para. 27: "The Trial Chamber recognizes the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance of and admissibility of these allegations at this stage of the proceedings. The appropriate stage will be at the trial of the accused."

[7] Shahabuddeen Opinion, para. 9.

[8] *Id.* para. 40 (italics added).

[9] *Id.* para. 14.

[10] *Id.* para. 21, quoting *R. v. Pettman*, 2 May 1985, unreported, per Purchas LJ.

[11] *Id.* para. 20.

[12] *Id.* para. 24.

[13] *Prosecutor v. Kupreskic*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999. One type of evidence which is well-recognised in the world's common law systems as relevant and yet generally inadmissible is past conduct used to establish that the accused "has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence." See also 31.

[14] *R v. Handy*, [2002] 2 SCR 908, paras. 139-147.

[15] Shahabuddeen Opinion, para. 20, quoting *Thomson v. R.*, (1989) 86 A.L.R. 1.

[16] Shahabuddeen Opinion, para. 20.

[17] *R. v. Handy*, [2002] 2 SCR 908, para. 77 quoting *R. v. Scopelliti* (1981), 63 CCC (2d) 481 (Ont. CA).

[18] Id. at para. 83.

[19] *R v. Cloutier* [1979] 2 SCR 709, p. 731, as quoted in *Prosecutor v. Delalic*, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 Into Evidence", etc., 19 January 1998, para. 29.

[20] *Cf.* Rule 89(D) of the Rules of the International Criminal Tribunal for Yugoslavia, which provides that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

[21] Shahabuddeen Opinion, para. 19.

[22] Prosecution Response, p. 2.

[23] Shahabuddeen Opinion, para. 11: "In the result, the charge could correctly be for a conspiracy made in, or continuing into, the mandate year even though the original conspiracy agreement was made prior thereto."

[24] Transcripts of 12 September 2003, p. 56: "This is the commencement of the conspiracy, Your Honour."

[25] Transcripts of 19 November 2002, p. 39.

[26] Transcripts of 16 September 2002, p. 122. See also Transcripts of 19 November 2002, p. 37: "You will see that in my answer I referred to 1990 and say that I do not subscribe to the thesis that there was a genocidal plan beginning in 1990. I speak instead of a pattern of learning, of incorporating certain elements that are repeated time after time, the same elements then also appearing at the time of the 1994 genocide."

[27] "More particularly, this evidence goes to the acts of Ntabakuze in both the targeting and the killings of certain individuals, such as Tutsi civilians and non-combatants; the existence of a command structure; how orders within that command structure were given and executed; the opportunity to prevent subordinates from committing criminal acts and to punish subordinates for having committed such acts." Prosecution Response, p. 7.

[28] *Prosecutor v. Kupreskic*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17

February 1999. See also *R v. Handy*, [2002] 2 SCR 908, paras. 37, 39: "The policy basis for exclusion is that while in some cases propensity inferred from similar acts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer." ... 'The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.'

[29] Cf. *Prosecutor v. Zejnil Delalic, Hazim Delic, and Esad Landzo*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 20; Shahabuddeen Opinion, para. 24.

[30] The situation here may be contrasted with that in *R v. Sidhu*, referred to in the Shahabuddeen Opinion, para. 22. There, the accused was charged with possession of explosives.

[31] *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 534; *Prosecutor v. Bagilishema*, Case No. ICTR-951A-T, para. 50.

[32] *R. v. Handy*, [2002] 2 SCR 908, para. 83.

[33] *Id.*

ANNEX 12

Prosecutor v. Blaškić, IT-95-14-T, Judgement, 3 Mar. 2000 para. 34;

IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Almiro Rodrigues
Judge Mohamed Shahabuddeen

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 March 2000

THE PROSECUTOR

v.

TIHOMIR BLASKIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

ANNEX

Abbreviations

ABiH
Muslim Army of Bosnia-Herzegovina

BH
Republic of Bosnia-Herzegovina

BRITBAT
UNPROFOR British Battalion

ICRC
International Committee of the Red Cross

3. Issues relating to evidence

25. Throughout the trial, the administration of the evidence gave rise to many motions relating both to the disclosure obligations of the parties and to the admissibility of the evidence. One of the characteristics of this case is that the questions relating to disclosure obligations, which typically arise at the pre-trial phase, persisted through the trial itself. It is also appropriate to deal with the unprecedented matter of access to confidential documents in related "Lasva Valley" cases and the lengthy procedure for Orders addressed to States for the production of documents .

a) Disclosure obligations

26. Seised of a Defence motion[58], the Trial Chamber rendered a Decision on 27 January 1997 setting out how it interpreted the scope of the parties' disclosure obligations under Rules 66, 67 and 68 of the Rules[59].

Pursuant to former Sub-rule 66(A) of the Rules, the Trial Chamber initially took up a broad interpretation of the notion of disclosure by concluding that all the prior statements of the accused appearing in the Prosecutor's case-file had to be disclosed to the Defence without delay whatever their nature or origin. The Judges further stated that the same criteria were to apply *mutatis mutandis* to the prior statements of the witnesses under that same Sub-rule 66(A). Nonetheless, the Trial Chamber attached two reservations to this interpretation, grounded on Sub- rules 66(C) and 70(A) of the Rules respectively.

Secondly, on the issue of the disclosure of the Prosecution witnesses' names to the Defence provided for under Sub-rule 67(A), the Trial Chamber found that all the names of the witnesses had to be disclosed "at the same time in a comprehensive document which thus permits the Defence to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations"[60].

Thirdly, the Trial Chamber evaluated the scope and methods of application of Rule 68 of the Rules relating to the Prosecutor's disclosure of exculpatory material. It recalled that the obligation was boundless and unquestionably fell upon the Prosecutor alone, though under the control of the Trial Chamber, if only because she was in possession of the said exculpatory material. However, the Trial Chamber drew a parallel between the evidence identified under Sub-rule 66(B) of the Rules "material to the preparation of the Defence" and Rule 68 exculpatory evidence. Applying the case- law on the interpretation of Sub-rule 66(B) in the *Celebici* case[61] to Rule 68, it therefore deduced that where the Defence contested the Prosecutor's execution of her obligations it "must present a *prima facie* case which would make probable the exculpatory nature of the materials sought"[62].

27. The Trial Chamber subsequently heard fresh motions on the matter during the same trial and clarified its case-law of 27 January 1997.

Hence, in response to a Defence motion, the Trial Chamber reviewed the notion of prior statements in the light of its foregoing case-law on the subject and found that topographical maps, personal journals and radio logs could not be likened to prior statements of witnesses within the meaning of Sub-rule 66 (A) of the Rules and did not need to be disclosed to the Defence[63]. The matter was also raised in respect of written orders of Tihomir Blaskic. The Trial Chamber assessed, however, that these were documents within the meaning of Sub-rule 66(B) of the Rules and fell under Sub-rule 66(A):

> all statements made by the accused during questioning in any type of judicial proceedings

> which may be in the possession of the Prosecutor, but only such statements[64].

The Defence also approached the Trial Chamber in order to have the statements of a third party presented by a witness at a hearing disclosed to it. The Judges limited the field of application of Sub-rule 66(A) of the Rules to the statements of only those witnesses whom the Prosecutor actually meant to call [65], in addition to the elements provided to the confirming Judge in support of the indictment .

28. In respect of application of Sub-rule 67(A) of the Rules on disclosure to the Defence of the names of the Prosecution witnesses called to appear, the Prosecutor was instructed to provide the Trial Chamber and the Defence with the list of the witnesses whom she intended to call to appear at least two working days beforehand[66]. The Trial Chamber did not adjudge it appropriate at this stage to rule on the proceedings as regards the reciprocal prior disclosure of the names of Defence witnesses[67]. It was only just before the Defence began to present its case that the Trial Chamber ordered that the names and identifying information of the Defence witnesses whom the Defence intended to call and the summary of the facts on which their testimony would bear be disclosed at least seven days before their appearance [68]. This was done for the purposes of a faster and more efficient conduct of the proceedings and pursuant to Rule 54 of the Rules.

29. Being seised of a Defence motion, the Trial Chamber clarified its initial case-law on the interpretation of Rule 68 of the Rules and stated that it assumed that the Office of the Prosecutor was acting in good faith. However it reserved the possibility to verify on a case by case basis the potential failures and, at time of trial, draw the necessary conclusions as regards the probative value to be given to the evidence in question[69].

b) The exception to the disclosure obligation set down in Rule 70 of the Rules

30. Pursuant to Sub-rule 70(A) of the Rules:

> reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case , are not subject to disclosure or notification

The Trial Chamber took note that the accused, appearing as a witness in accordance with Sub-rule 85(C) of the Rules, relied upon his personal notes made during the preparation of his defence which included a war diary kept by his assistant and a military logbook of activities held at the headquarters. The Judges were of the opinion that these materials did not constitute internal documents within the meaning of Sub-rule 70(A) of the Rules and considered it appropriate and in the interests of justice to be able to view them. In so doing and where need be, they ordered the Defence or the Federation of Bosnia-Herzegovina to disclose them to the Trial Chamber[70]. The Defence replied that it no longer had these materials in its possession.[71]

31. The other paragraphs under Rule 70 of the Rules deal with the exception to the disclosure obligation set down in Rules 66, 67 and 68 of the Rules. The Trial Chamber acknowledged that this was an exceptional and strictly governed right which benefited *mutatis mutandis* the accused and was intended to allow the use of confidential source information which, failing the said provision, would allegedly prove unusable[72]. In light of several Prosecution and Defence submissions[73] within the terms of Rule 70, the Judges stated its conditions of applicability and its limits.

32. In accordance with Rule 70 of the Rules, the Trial Chamber held that the information specified must meet several conditions, that is: be in the applicant's possession ; have been disclosed confidentially - the holder or holding entity being the sole judge of its confidentiality; and have been used for the sole purpose of collecting new evidence which, contrary to initial information, did not enjoy Rule 70 protection .[74]

33. Pursuant to Sub-rule 70(B) of the Rules, the transmission and use in evidence of information responding to the criteria specified above are subject to the consent of the person or entity providing them. The Trial Chamber nevertheless firmly recalled the limits of this protection where the rights of the Defence were involved and affirmed that once the person or entity holding the information had consented to its use in evidence it had to be disclosed without undue delay to the Defence and that the person or entity concerned could not determine whether and, where applicable , when it was appropriate to disclose the said information[75]. The Trial Chamber further observes that recourse to this provision of the Rules allowed highly confidential evidence to be presented to the Trial Chamber, in particular by former representatives of the government of a member State of the United Nations .

c) The admissibility of the evidence

34. The admissibility of the evidence presented at trial was also the subject of Decisions on several occasions. The principle embodied by the case-law of the Trial Chamber on the issue is the one of extensive admissibility of evidence - questions of credibility or authenticity being determined according to the weight given to each of the materials by the Judges at the appropriate time.

35. In this respect, it is appropriate to point out that the Trial Chamber authorised the presentation of evidence without its being submitted by a witness. The Trial Chamber relied on various criteria for this. At the outset, it is appropriate to observe that the proceedings were conducted by professional Judges with the necessary ability for first hearing a given piece of evidence and then evaluating it so as to determine its due weight with regard to the circumstances in which it was obtained , its actual contents and its credibility in light of all the evidence tendered. Secondly, the Trial Chamber could thus obtain much material of which it might otherwise have been deprived. Lastly, the proceedings restricted the compulsory resort to a witness serving only to present documents. In summary, this approach allowed the proceedings to be expedited whilst respecting the fairness of the trial and contributing to the ascertainment of the truth.

36. Nonetheless, the discussions between the parties as to how evidence was to be administered were generally animated and acrimonious. By way of example, the Trial Chamber notes the following submissions.

Initially, the Defence filed a standing objection to the admission of hearsay with no inquiry as to its reliability. The Trial Chamber rejected this objection on the ground that Sub-rule 89(C) of the Rules authorises the Trial Chamber to receive any relevant evidence which it deems has probative value and that the indirect nature of the testimony depends on the weight which the Judges give to it and not on its admissibility[76].

The Defence raised a similar issue regarding the authenticity of documents produced during testimony. The Trial Chamber found that any documentary evidence produced by a party and identified by a witness was admissible and that any dispute over its authenticity did not derive from its admissibility but from the weight which it would be appropriate to give to it[77].

Furthermore, the Trial Chamber was confronted with the problem of the admission of the statement of a

deceased witness which had been given under oath to the Prosecutor's investigators. The Judges considered this to be clearly one of the exceptions to the principle of oral witness testimony, in particular for cross-examination, accepted in the different national and international legal systems and therefore they admitted the said statement in evidence but reserved the right to give it the appropriate weight when the time came[78].

Finally, in order to assist the Judges in their search for the truth, the Trial Chamber authorised that the statement of a witness who had already appeared before it be admitted into evidence. In so doing, it considered that pursuant to Rule 89 of the Rules it could admit any relevant document with probative value and reserve the right to evaluate freely the weight to be given to it at the end of the trial [79].

ANNEX 13

Prosecutor v. Delalić et al., IT-96-21-T, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, 19 Jan. 1998, para. 20.

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding

Judge Elizabeth Odio Benito

Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 19 January 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTION OF THE PROSECUTION FOR THE ADMISSIBILITY OF EVIDENCE

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Michael Greaves, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") is a motion requesting the admission of a number of documents and videotapes into evidence ("Motion") which the Office of the Prosecutor ("Prosecution") orally presented on 31 October 1997. Oral arguments continued on 3, 5 and 6 November 1997. The background to the Motion is the following.

2. On 18 March 1996 members of the Austrian police, in response to a request for co-operation from the Prosecution, carried out searches in a number of locations in Vienna, Austria. Among the localities searched were the premises of the company "Inda-Bau", a firm with which the accused Zejnil Delalic ("Delalic") is alleged by the Prosecution to have close links, and the apartment of the accused Zdravko Mucic ("Mucic"). In the course of this operation a large number of videotapes and twelve folders containing documents were seized at the premises of Inda-Bau. A further four videotapes and certain documents were seized in Mucic's apartment.

3. After having heard the testimony of four officers of the Austrian police appearing as witnesses for the Prosecution on matters relating to this operation, the Trial Chamber, in an oral decision of 12 September 1997, admitted the twelve folders found at the premises of the Inda-Bau company into evidence. In this decision, the Trial Chamber was satisfied that the chain of custody had been established, and admitted the folders but not their contents. In a subsequent decision on 22 October 1997, the Trial Chamber admitted into evidence two of the documents allegedly originally contained in these folders, together with portions of a video-recording allegedly seized at Inda-Bau (exhibits 137, 141 and portions 00.00 - 02. 41 and 11.49 - 16.26 of exhibit 114). These exhibits were admitted on the basis of the evidence given by the Prosecution witness General Pasalic, who in his testimony was able to authenticate the documents and who recognised the contents of the videotape as a recording of an interview given by himself in December 1992.

4. Among the four members of the Austrian police who appeared before the Trial Chamber was District Inspector Thomas Moerbauer, who in his evidence described how he, subsequent to the seizures, had examined and prepared an index of the documents contained in the twelve folders found at Inda-Bau. In the course of his testimony Moerbauer was presented by the Prosecution with a number of documents and asked to verify them as documents originally contained in the twelve folders seized at Inda-Bau.

5. The Prosecution now moves to have the documents presented to Moerbauer, together with a number of videotapes allegedly seized at Inda-Bau and the accused Mucic's apartment, admitted into evidence. These are exhibit numbers 110, 111, 112, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 143, 144, 145, 146 and 147 A-C ("the exhibits").

THE TRIAL CHAMBER, HAVING CONSIDERED the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Applicable Provisions

6. It is appropriate to set out in full certain provisions of the Rules of Procedure and Evidence of the International Tribunal ("Rules") which were cited to the Trial Chamber during oral argument.

Rule 89

General Provisions

(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 which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 95

Exclusion of certain evidence

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings.

B. Pleadings

1. The Prosecution

7. The Prosecution asserts that the exhibits should be admitted into evidence since they are relevant to the charges set out in the Indictment and have probative value. According to the Prosecution, the oral decision of 12 September 1997 confirmed that the chain of custody of the exhibits has been established. Moreover, the Prosecution argues that the exhibits have been recognised by the witness Moerbauer during his testimony as documents and tapes seized in Vienna by the Austrian police.

8. The Prosecution states that in order to establish the relevance and probative value of the exhibits, some showing of reliability is required. In this respect the Prosecution asserts that the contents of the exhibits, together with the place and circumstances in which they were found, provide sufficient indicia of reliability. In the opinion of the Prosecution, the fact that some of the other items which were seized at the Inda-Bau premises have been admitted into evidence already, after authentication by the witness General Pasalic, further adds to the reliability of the exhibits. It is further argued that there exists an

inter-relationship between the exhibits, and that the showing of this inter-relationship proceeds to demonstrate the authenticity and reliability of the documents and tapes now sought to be admitted.

9. The exhibits are, according to the Prosecution, relevant and of probative value to the charges since they directly or indirectly relate to the position held by Delalic, and to a lesser extent Mucic, in the Konjic area in 1992. This is essential to the question of command responsibility with which Delalic and Mucic are charged in the Indictment. Moreover, the Prosecution is of the opinion that all the exhibits corroborate the evidence already received by the Trial Chamber relating to the situation in the Konjic area at the time of the alleged offences.

2. The Defence

10. Counsel for all four accused ("Defence") object to the admission of the exhibits. The Defence argues that the documents and videotapes sought to be admitted are both irrelevant and lack probative value as they are completely unreliable. Moreover, Counsel for Delalic insists that the Prosecution has been unable to demonstrate the origins of the exhibits. Counsel submits that although the witness Moerbauer in his testimony stated that he, in the process of preparing an index of the documents seized at Inda-Bau, put a mark on every individual document, he was during the course of his testimony unable to identify any such mark on the documents now sought to be admitted. Counsel therefore submits that there is no proof that the documents presented to the Trial Chamber are the same as those seized at Inda-Bau. Concerning those videotapes allegedly seized at Inda-Bau which the Prosecution now presents to the Trial Chamber (exhibits 115 and 116), Counsel argues that it is not proven that they were indeed found at the Inda-Bau company. According to the Defence the Prosecution has not explained a discrepancy which exists between the number of tapes initially reported seized and the number subsequently counted in the process of indexing and filing of the tapes.

11. The Defence suggests that the Trial Chamber adopts a clear procedure for the admission of evidence. According to the Defence, what needs to be established is first the authenticity and reliability of the documents. The Defence adopts the view that proof of the authorship of the documents is crucial in this respect, and divides the documents now before the Trial Chamber into three categories. First, there are those which purport to be written by a third person who is not a party to the present proceedings and who has not been called to testify and authenticate the documents. According to the Defence, these documents are in effect hearsay evidence and it is submitted that their admission would be contrary to the right of the accused to have the witnesses against themselves examined. The Defence asserts that since the Prosecution has failed to call the alleged authors of these documents to give evidence in court so that they could be cross-examined, there is no way by which the reliability of the contents of this category of documents can be tested. A second set of documents is those that are purported to be written by one of the accused. The Defence emphasises that the Prosecution never has made any attempt to have the relevant accused authenticate any of these documents, and concludes that there is no proof whatsoever that they were in fact written by the accused. A third type of document presented is those which bear no signature and where there is no clear indication of who the author might be. According to the Defence it is, in view of this lack of evidence of authorship, simply impossible to demonstrate reliability and trustworthiness in relation to this category of documents.

12. The Defence rejects the approach taken by the Prosecution whereby one document, the reliability of which has not been established and which is not in evidence, is used to corroborate another document. In the opinion of the Defence it is an improper procedure when one unreliable document is used to corroborate another, and it is submitted that the alleged links between the documents are tenuous and consist of suppositions by the Prosecution. The Defence maintains that the authenticity and reliability of

the documents sought to be admitted has not been established and therefore objects to their admission.

13. According to the Defence, it is only as a second step in the process of deciding the admissibility of evidence that the Trial Chamber can move on to consider the relevance and probative value of the exhibits. In this respect the Defence contends that the evidence sought to be admitted by the Prosecution is completely irrelevant and should for that reason not be admitted. The Defence argues that the documents do not refer to the Celebici camp and often only give an account of events which are wholly unrelated to the charges in the Indictment and which go beyond the time-frame with which the Indictment is concerned.

14. The Defence concludes that these irrelevant and unreliable documents clearly cannot have any probative value. The Defence, therefore, submits that the exhibits should not be admitted.

C. Findings

15. The question before the Trial Chamber is that of the admissibility of evidence, a matter where the national legal systems of the world have adopted diverging approaches. The procedure of the International Tribunal, with its unique mixture of common and civil law features, does not conform to any one tradition in this respect. In contrast to the common law, where questions of admissibility and exclusion of evidence occupy a prominent place in criminal procedure, the ten provisions of the Rules which regulate all evidentiary matters in the proceedings before the International Tribunal do not contain a detailed set of technical rules relating to this issue.

16. The question of admissibility of evidence before the International Tribunal is governed by Section 3 of the Rules which is entitled "Rules of evidence". The approach adopted by the Rules is clearly one in favour of admissibility as long as the evidence is relevant and is deemed to have probative value (Sub-rule 89(C)), and its probative value is not substantially outweighed by the need to ensure a fair trial (Sub-rule 89(D)). Evidence may further be excluded on the grounds given in Rules 95 and 96. Sub-Rule 89(E) relates to the authentication of evidence out of Court. Finally, Sub-rule 89(B) contains a provision of a residual nature which, in cases not otherwise provided for in the Rules, permits the application of such rules of evidence as will best favour a fair determination of the matter in question and which are consistent with the Statute and general principles of law.

17. Of these provisions, Sub-rule 89(C) is of particular pertinence to the issue before the Trial Chamber. According to the plain text of this provision, the two requirements for the admissibility of evidence are those of relevance and probative value. In relation to the question of the substantive meaning of these requirements, the Trial Chamber notes that evidence which is of probative value within the common law tradition has been defined as "evidence that tends to prove an issue"[1]. As concerns relevance, it is often said that this concept in itself contains an implicit requirement of probative value. Thus it has been remarked by one prominent commentator on the subject that:

> [t]here are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case....The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove[2].

Similarly the Supreme Court of Canada, in *R. v. Cloutier* (2 S.C.R. 709, 731) has endorsed the following

statement by Sir Rupert Cross[3]:

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

As the Trial Chamber noted in its Decision on the Prosecution's Oral Request for the Admission of Exhibit 155 into Evidence and For an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample (19 January 1998) ("Mucic Handwriting Decision") it is, however, obvious that these are concepts that beg of a clear and easy definition *in abstracto*. Their application calls for evaluations based on human experience as well as logic[4], and will depend upon the particular circumstances of the case and the nature of the evidence sought to be admitted.

18. In its decision on the admissibility of hearsay evidence in the case of *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion on Hearsay, 5 August 1996, IT-94-1-T, 5 August 1996,), Official Record at Registry page ("RP") D 11597 - D 11588) ("Hearsay Decision") a majority of Trial Chamber II (Judges McDonald, presiding and Vohrah, separate opinion by Judge Stephen) found that the Rules implicitly require that reliability be a component of admissibility. The Trial Chamber agrees with the reasoning of that decision, and considers reliability to be an inherent and implicit component of each element of admissibility in the sense described below. It is clear that if evidence offered is unreliable, it cannot be either relevant or of probative value. As such, it is inadmissible under Sub-rule 89(C).

19. The Defence contends, however, that a determination of reliability should be seen as a separate, first step in assessing a piece of evidence offered for admission, and argues that it is only if this first hurdle has been passed that the Trial Chamber can proceed to consider the relevance and probative value of the evidence. This view of reliability as a separate requirement, independent of those provided for by Sub-rule 89(C), has been rejected by the Trial Chamber in the Mucic Handwriting Decision. As the Trial Chamber there noted, it is a cardinal rule of construction of legislation that where the words of a provision are clear and unambiguous, the task of interpretation does not arise. So it is with Sub-rule 89 (C) and it is, therefore, neither necessary nor desirable to add to that provision a condition of admissibility which is not expressly prescribed for by that provision.

20. While the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight. As noted above, it is an implicit requirement of the Rules that the Trial Chamber give due considerations to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility. However, this terminology may leave some room for misunderstanding, and could possibly be misperceived as demanding that a binding determination be made at this stage as to the genuineness, authorship or credibility of evidence. For this reason the Trial Chamber wishes to make clear that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence. The threshold standard for the admission of evidence, however, should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence gathered.

21. The Defence argues that the admission of documents whose alleged authors are not appearing as witnesses in the present proceeding amounts to a deprivation of the right of the accused under Article 21 (4)(e) of the Statute of the International Tribunal ("Statute") to have the witnesses brought against them examined, and that as such it is incompatible with the Trial Chamber's obligation under Article 20(1) of the Statute to ensure a fair trial. For this reason, and with reference to Rules 89(D) and 95, it is asserted that the Trial Chamber should refuse admission of such documents into evidence.

22. It is clear from the relevant provisions of the Rules that there is no blanket prohibition on the admission of documents simply on the ground that their purported author has not been called to testify in the proceedings. Instead the conditions for admissibility are those contained in Sub-rule 89(C) which have been discussed above. Furthermore, should the Trial Chamber consider the probative value of any particular exhibit of this character to be substantively outweighed by the need to ensure a fair trial, it may be excluded in accordance with Sub-Rule 89(D). There is, however, no ground for a general finding to the effect that the probative value of documents of this category is so outweighed by any prejudicial effects that they should be considered generally inadmissible. It is a different matter that the probative value of such evidence by necessity will be affected by the fact that it has not received the scrutiny involved in the cross-examination of a witness. This is an important factor to which the Trial Chamber will give due consideration at the stage of assessing the weight to be attached to exhibits of this nature.

23. The Trial Chamber will now proceed to consider the admissibility of the exhibits at issue. In its discussion the Trial Chamber will distinguish between the documents on the one hand and the videotapes on the other. The Trial Chamber does not consider it necessary to treat each exhibit separately, but will rather group them into appropriate categories.

1. Documents

24. In considering the documents which allegedly form part of material seized at the Inda-Bau premises in Vienna, the Trial Chamber will first address the objection of the Defence that the Prosecution has not proven where the documents come from. Secondly, the documents will be grouped into three categories and discussed per group.

25. The Defence alleges that the witness, Moerbauer who was brought before the International Tribunal to authenticate the documents, was unable to retrieve the marks he had put on the documents subsequent to their seizure. The Prosecution, on the other hand, correctly points to the testimony of this witness who, on the basis of the inventory he prepared, was able to confirm that each of the documents now sought to be admitted was seized at the premises of the Inda-Bau company and put in one of the binders admitted into evidence by the Trial Chamber by its decision of 12 September 1997. Moreover, in his testimony Moerbauer was able to identify from which particular binder the individual documents presented to him were taken. There can be, therefore, no doubt that the witness Moerbauer positively identified every document now before the Trial Chamber as being a document found at the Inda-Bau premises.

26. For the admissibility of each individual exhibit it needs to be shown that the offered evidence is both relevant and of probative value. In view of their common origin and context, however, the Trial Chamber considers it appropriate to evaluate the admissibility of the documents grouped into the following three categories. The first group consists of documents which have already been admitted. Secondly, there are a number of documents which are particularly relevant to the case. A third, larger group of documents are suggested to be of more general relevance only.

(a) Documents already admitted.

27. Of the documents seized at Inda-Bau, the Trial Chamber has already admitted the documents numbered as exhibits 137 and 141. These exhibits have been admitted through the testimony of General Pasalic who was able to authenticate the documents on 22 October 1997. The Defence has not presented any additional information which could give rise to the exclusion of these documents at this stage. It is, therefore, unnecessary to consider those documents again. The exhibits 137 and 141 remain admitted into evidence.

28. Exhibit 118 consists of the order for appointment of Zejnil Delalic as commander of Tactical Group 1 and was recognised by the accused Delalic during an interview with the Prosecution on 22 and 23 August 1996 at Scheveningen. A copy of the document was consequently annexed to the record of interview which has been admitted as exhibit 99 by the Trial Chamber's Decision on the Motion for the Exclusion of Evidence by the Accused Zejnil Delalic, dated 25 September 1997 (RP D 5162- D 5180). The exhibit is further identical to the document which was admitted through the testimony of Dr Marie-Janine Calic as exhibit 71 by the Trial Chamber's decision of 24 March 1997. The Defence has not presented any information which could give rise to the exclusion of exhibits 71 and 99, and they remain admitted into evidence. It is not necessary to reconsider the admissibility of this document. On the Prosecutor's motion it is admitted as exhibit 118.

(b) Documents of particular relevance.

29. The second group of documents presented to the Trial Chamber for admission consists of document of particular relevance to the charges of command responsibility against the accused Delalic. The documents numbered as exhibits 117, 130, 131, 132, 144 and 147A all refer in some way to the position of Delalic as commander of Tactical Group 1. It is clear that these documents fulfil the first requirement for admissibility under Sub-rule 89(C) since they are directly relevant to certain of the charges set out in the Indictment.

30. Exhibit 144 is a report allegedly written by Delalic which gives an account of the incidents which occurred in the Konjic area in 1992. The letter produced as exhibit 117 contains very similar information, as does exhibit 130 which is a report allegedly written by Mucic giving a rather detailed account of the incidents which occurred in Konjic in 1992, and the role played by certain persons including Delalic. Similarly exhibit 147 A, which is a registration card for the United Association of War Veterans of the Republic of Bosnia and Herzegovina, contains a description of Delalic as co-ordinator and later commander of Tactical Group 1. Exhibits 131 and 132 are purportedly written by the Deputy Commander of Tactical Group 1, Edib Saric. This account of the events and the position held by Saric corresponds to the information contained in the document previously admitted as exhibit 137. The information provided by these documents is further consistent with that given by the witness General Pasalic, and that contained in other documents now presented to the Trial Chamber.

31. The documents now at issue were all found at the premises of Inda-Bau, a company with which Delalic had some form of association and where he was observed by the Austrian Police a few days before the seizure. The pattern of events described in the documents is, to an extent, consistent between the documents themselves, and generally corresponds to witness statements and documents already admitted into evidence. It is therefore warranted to conclude, at this stage, that sufficient indicia of reliability have been established for the documents presented to the Trial Chamber to be deemed both relevant and *prima facie* of probative value. As such they are admissible. It should again be emphasised that this decision does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are matters to be assessed by the Trial Chamber at a later stage in the course of determining the weight to attached to these exhibits.

(c) Documents of general relevance

32. The third group of documents which the Prosecution seeks to admit are numbered exhibits 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 135, 143, 145, 146 and 147 B - C. The general focus of these exhibits is again to show that Zejnil Delalic was appointed commander of Tactical Group 1, that he regarded himself as such and was so regarded by others. Similarly, Mucic appears as commander of the Celebici prison. Altogether these exhibits tell a story of the activity of Delalic and Mucic in the Konjic area in 1992. As such, they corroborate the exhibits 118, 137, 141, 144 and 147A which have been properly admitted into evidence. They are documents which were found in the Inda-Bau premises, and which were not obtained under circumstances which render reliance upon them objectionable. Specifically relating to exhibit 125, the Trial Chamber notes that the Defence's challenge to the authenticity and reliability of this document must be seen in the light of the fact that an identical document was submitted by Counsel for Delalic on 27 October 1997 and was marked but not tendered as Defence (Delalic) exhibit D82/1.

33. In English law, according to the doctrine of *res gestae*, a fact may be held relevant to a fact in issue on account of its contemporaneity with the matter under investigation. This may be so if it throws light on the matter under investigation by reason of the proximity in time, place or circumstance in such a manner as to constitute part of the event being investigated. Hence, when a statement is made contemporaneously with the occurrence of the act or event being inquired, such a statement is admissible for the purposes of explaining the existence of the act or event. Such evidence is therefore, as an exception to the hearsay rule, admissible as part of the *res gestae*.

34. It is a correct proposition of law that the proper person to justify or explain the circumstances of an act or event is the person who acted. However, it is difficult in certain circumstances to have direct evidence of the act or statement of the actor. Hence, statements are admissible if made roughly contemporaneously with the subject matter under enquiry by the actor related to the issue, and having connections with it. This is, in the opinion of the Trial Chamber, the position of this third category of the exhibits. That the statement was made by the actor or another participant can be determined from circumstantial evidence unequivocally pointing towards the fact. For instance, exhibits 124 and 125 are statements relating to the escape of Delalic from Konjic. Statements which acknowledge the escape, statements that Zejnil Delalic had donated 2000 uniforms to soldiers and had worked without rest for twenty-four hours, can only be referable to Delalic as the maker. Similarly, other exhibits contain spontaneous statements relating to the events in which the accused Delalic was involved. This is the case for instance with his assertion of innocence of accusations of dishonesty or flight from the region. It is not necessary in the situation to prove that the statements are true. It is sufficient that they were made: that in the circumstances it is part of the *res gestae*.

35. The Trial Chamber is of the opinion that the exhibits tendered contain statements made contemporaneously with the issue of the position of Delalic and Mucic in the period of hostilities under enquiry. They shed light on the role played and positions occupied by them. Being part of the entire transaction, they are admissible as evidence in these proceedings.

2. Videotapes

36. In addition to the documents discussed above, the Trial Chamber was also asked to consider the admissibility of five videotapes. Of these five, three tapes had been seized at the premises of the accused Zdravko Mucic in Vienna, and the other two are alleged to have been found at the Inda-Bau premises.

37. The first set of tapes was recovered by the witness Wolfgang Panzer, District Inspector at the Vienna Police Department, who testified before the Trial Chamber and recognised the tapes. The videotapes, exhibits 110 to 112, show different scenes at the Celebici camp. The tapes are relevant since they relate to the accused Mucic and his activities at the Celebici camp. The tapes were found at the apartment of

Mucic, who is easily recognisable on the tapes. The tapes, therefore, demonstrate indicia of reliability and are deemed to have probative value. Exhibits 110, 111 and 112 are admitted into evidence.

38. The two other tapes now presented by the Prosecution for admission are exhibits 115 and 116. The Prosecution submits that both tapes formed part of a larger number of fifty-four tapes recovered from the Inda-Bau premises in Vienna. The Defence points out that in the initial record of the seizure (the "Niederschrift") prepared at the time of the search by the witness Wolfgang Navrat of the Vienna Police Department, the number of tapes seized at Inda-Bau was given as fifty-one. It was only one month after the seizure that the witness Moerbauer, when making an inventory of all the documents and videotapes recovered, counted fifty-four tapes. In the opinion of the Defence this discrepancy makes it impossible to conclude with certainty that the tapes sought to be admitted were in fact found at the premises of Inda-Bau in Vienna.

39. Exhibit 115 is a video of an interview with the witness General Divjak and Delalic, together with another man. The second tape submitted as exhibit 116 consists of two parts of which the Prosecution seeks to admit the first, being a recording of the Zagreb television program "Slikom na Sliku" of May 1992 which contains an interview with Delalic. Both videotapes contain information concerning the general situation in the Konjic area and the activities of the accused Delalic in 1992 and are therefore relevant.

40. The nature of the contents of the two exhibits - that is recordings of recognisable persons conducting interviews - is further such that their probative value is not necessarily excluded by a certain remaining uncertainty concerning the source of these exhibits. The Trial Chamber notes that it has earlier admitted portions of another videotape alleged by the Prosecution to have been seized at Inda-Bau on the same occasion. This is Exhibit 114 which shows an interview with General Pasalic, who testified before the Trial Chamber that he remembered the interview. On this basis portions of the tape were admitted into evidence on 22 October 1997. As concerns the two videotapes now sought to be admitted, the witness General Divjak has testified before the Trial Chamber and recognised the portion of exhibit 115 showing the interview given by himself and Delalic. Although not shown exhibit 116 as such, Delalic has, when asked about it by the Prosecution in the interview conducted in Scheveningen on 23 August 1996, acknowledged that he did participate in such an interview for the television program "Slikom na Sliku" at the relevant time. In this context it should further be noted that parts of this latter tape were shown to the witness Branko Gotovac by Counsel for the accused Esad Landzo on 25 March 1997, upon which it was subsequently admitted as Defence (Landzo) exhibit D5/4. On this occasion Counsel informed the Trial Chamber that this tape, which had been given to the Defence by the Prosecution, was one of the tapes that had been seized from Delalic. An excerpt from the tape has also been used by Counsel for Delalic and has been admitted as Defence exhibit (Delalic) D11 6/1. As the Prosecution correctly has pointed out this would seem to indicate that also members of the Defence are placing some credibility on this exhibit.

41. The Trial Chamber is accordingly satisfied that sufficient indicia of reliability have been shown for the tapes to be deemed both relevant and of probative value. Exhibits 115 and 116 are therefore admissible. The portions of exhibit 114 earlier admitted remains admitted into evidence.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the motion of the Prosecution and

PURSUANT TO RULE 54,

IN ACCORDANCE WITH RULE 89,

HEREBY ADMITS exhibits 110, 111, 112, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 143, 144, 145, 146 and

147A - C into evidence.

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

Adolphus Godwin Karibi-Whyte

Presiding Judge

Dated this nineteenth day of January 1998

At The Hague,

The Netherlands.

[Seal of the Tribunal]

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1. Henry C. Black, Black's Law Dictionary 1203 (6th ed. 1991).

2. Charles T. McCormick, McCormick on Evidence, pp. 338-339 (4th ed. 1992).

3. Cross on Evidence, p. 16 (4th ed. 1974).

4. Cf. Halsbury's Laws of England, Volume 17, para 5 (4th ed. 1976).

ANNEX 14

ICTR Press Release ICTR/INFO-9-13-22.EN dated 8 July 2002

United Nations
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

PRESS BRIEFING *(non official - for media information only)*

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PRESS BRIEFING BY THE SPOKESMAN OF THE ICTR

Kingsley Chiedu Moghalu, Legal Advisor and Spokesman for the International Tribunal, today gave the following briefing to the media.

Twelfth Plenary Session of the Tribunal

The 12th Plenary Session of the Judges of the International Criminal Tribunal for Rwanda (ICTR) was held last weekend from 5-6 July 2002 at the seat of the Tribunal at Arusha, Tanzania. The Judges of the Tribunal's Trial Chambers and Appeals Chamber, the Prosecutor, and the Registrar participated in the Plenary. A number of important amendments and additions to the Rules were adopted by the Judges and will be posted on the ICTR Website as soon as the definitive texts are available. They include but are not limited to:

New Rule 11 bis

This new rule provides for the transfer of cases from before the Tribunal to national courts for prosecution. The circumstances in which this can happen are: where, on application by the Prosecutor, or by its own decision, it appears to a Trial Chamber that:

(i) The authorities of the country in which the accused was arrested (the arresting State) are prepared to prosecute the accused in their own courts; or (ii) the authorities of another country (the receiving State) are prepared to do so, and the authorities of the arresting State do not object; and (iii) It is appropriate in the circumstances for the courts of the arresting or receiving State to exercise jurisdiction over the accused.

However, the Trial Chamber may rescind an order made under this Rule at any time after making the order, and before the accused is convicted or acquitted by a national court, upon the Prosecutor's application and after affording an opportunity to the authorities of the State concerned to be heard. The Chamber would then issue a formal request for the case to be deferred to the ICTR in exercise of the primacy of the jurisdiction of the Tribunal.

The purpose of this new Rule is to enable the International Tribunal to concentrate on a limited number of important cases in order to accomplish its completion strategy that seeks to finish trials at first instance by 2008. The new Rule, which is inspired by the notion of universal

jurisdiction, will allow the exercise of concurrent jurisdiction for crimes of genocide, crimes against humanity and war crimes committed in Rwanda in 1994 between national courts and the International Tribunal, while retaining the primacy of the latter's jurisdiction.

You will recall that, under the previous state of things, judicial cooperation to prosecute accused persons of suspects for these crimes was a "one-way street" in which national jurisdictions must transfer such persons to the ICTR if the Tribunal wished to try them. But the Tribunal was not empowered to hand over persons it had indicted to a national jurisdiction. Perhaps the classic demonstration of this scenario was the *Ntuyahaga* case in 1999, in which Trial Chamber I granted the Prosecutor's request to drop charges against the accused, but denied the request that he be handed over to the Tribunal's Host Country (Tanzania) or Belgium.

Another important aspect of the new Rule 11 *bis* is that it is the first time that any international criminal tribunal of the United Nations has been judicially empowered to transfer its cases to a national jurisdiction other than the State in which the accused was arrested, where it is deemed appropriate, under the notion of universal jurisdiction. Rule 11 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia at The Hague provides for the possibility of that Tribunal transferring an accused person to the arresting State.

New Rule 45 quater

This new Rule provides that a Trial Chamber may, if it decides that it is in the interest of justice, instruct the Registrar to assign a counsel to represent the interests of the accused. The Rule formalizes a power that the Tribunal has previously exercised under its "inherent powers" in cases where an accused person has either declined to engage a lawyer to defend him or her, or is indigent and has declined counsel assigned by the Tribunal.

You will recall that, in the ongoing "Media Trial " of three former senior Rwandan media executives at the ICTR, Trial Chamber I instructed the Registrar to assign a counsel to represent the interests of one of the three defendants, Mr. Jean Bosco Barayagwiza, in these circumstances. By way of comparative illustration also, you are aware that, at the ICTY, Mr Slobodan Milosevic declined to formally appoint a lawyer or accept the assignment of a lawyer by that Tribunal to represent his interests, hence the appointment by that Tribunal of a number of lawyers as a*micus curiae* (Friend of the Court) to perform similar roles. The New Rule 45 *quater* of the ICTR is the first such provision in the Rules of Procedure and Evidence of an international criminal tribunal.

New Rule 92 bis

This New Rule provides for proof of facts other then by oral evidence. It provides that a Trial Chamber may admit, wholly or partially, the evidence of a witness in the form of a written statement in place of oral testimony where such a statement seeks to prove a matter other than the acts and conduct of the accused as charged in the indictment.

Factors that would favour the admission of such a written statement include, but are not limited to, circumstances in which oral testimony of facts similar to the evidence in question has already been admitted, where the evidence relates to revelant historical, political or military background, or consists of a general or statistical analysis of the ethnic composition of the

population in the places to which the charges relate. Other factors that would favour admission of such written statements include where it concerns the impact of crimes upon victims, relates to the character of the accused or to factors to be taken into account in determining sentence.

Factors against the admission of evidence in such a form include the existence of an overriding public interest in the evidence in question being presented orally and where a party objects that its nature or source make it unreliable. If the prejudicial effect of such evidence outweighs it probative value, this would also be a factor against its admission.

New Rule 92 *bis* is an important judicial reform measure. It has the potential to further speed up proceedings before the ICTR by significantly reducing as much as possible the consideration of time-consuming evidence inside the courtroom. A similar rule already exists in the Rules of Procedure and Evidence of the ICTY.

New Article 5 bis of the Code of Professional Conduct for Defence Counsel: Fee splitting.

The new provision in the Code of Conduct for Defence Counsel at the ICTR expressly prohibits fee-splitting in its various forms, between defence counsel remunerated by the Tribunal under its legal aid programme, and their clients (any detainee of the Tribunal). Where defence counsel are being requested, induced or encouraged by their clients to enter into fee splitting arrangements, they are required by this new provision to advise their clients on the unlawfulness of such practice and report the incident to the Registrar. The new provision recognizes that fee-splitting is not limited to financial arrangements. Where a counsel is found to have engaged in fee-splitting, the Registrar will take action in accordance with the Tribunal's Directive on Assignment of Defence Counsel. It will be recalled that the Registrar has already taken strong disciplinary action in a case where a defence counsel at the Tribunal, Mr. Andrew McCartan of the Bar of Scotland, was found to have engaged in financial malfeasance. Mr. McCartan was discharged from the case in which he was defence counsel and the Bar Association of which he was a member was notified of the measure and the reasons for it. He appealed against the decision to the President of the Tribunal but the latter upheld the Registrar's decision.

Current Status of detainees

There are currently 22 persons on trial at the ICTR. Twenty-nine persons are awaiting trial. The Tribunal has convicted eight persons and acquitted one. Six of the eight convicts including former Rwandan Prime Minister Jean Kambanda are serving their prison sentences in Mali

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