ICTR-98-42-T
15. 5. 2002
(6550 — 6523)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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

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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

[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."

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;

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[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."

(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.

[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."

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".

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

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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

[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,

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).

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[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.

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.

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.

[17] Ntakirutimana, para. 36

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.

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[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.

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

[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.

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 Presiding Judge	Winston C. Matanzima Maqutu Judge	Arlette Ramaroson Judge

[Seal of the Tribunal]