



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

Court Management Support – Court Records

CS7 - NOTICE OF DEFICIENT FILING FORM

Date:	5/11/2004	Case Name:	The Prosecutor v. Norman Fofana & Kondewa
		Case No:	SCSL-2004-14-T
To:	PROSECUTION: Coté, Johnson DEFENSE: Counsel for Norman, Fofana & Kondewa CHAMBER: Appeals Chamber OTHER: Registry		
From:	Neil Gibson: Court Management		
CC:			
Subject	Pursuant to article 12 of the Directive to on Filing Documents before the Special Court, the following document(s) does not comply with the formal requirements laid down in Articles 3-11.		

Dated: 2004

Reason:

- Article 5: Mis-delivered to the Court Management Section
- Article 7 : Format of Motions and other processes
- Article 8 : Lengths and sizes of briefs and others
- Article 10 : After-hours filing
- Other reasons: ***Filed out of time The Document entitled Prosecutions Response to Fofana Notice of Appeal and Submission Against The Decision on Prosecutions Motion for Judicial Notice and Admission of Evidence is lodged 1 day late***

-
-
-

Signed: *Nijla*

Dated: ~~2004~~ 5-11.04 .

	No. of pages transmitted including this cover sheet: In case of transmission difficulties, please contact: Fax Room:
Tel: _____	Fax: _____ Email: _____

CMS7 FORM

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Robin Vincent

Date filed: 5 November 2004

PROSECUTOR **Against** **SAMUEL HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA
(Case No. SCSL-2004-14-T)

**PROSECUTION'S RESPONSE TO FOFANA NOTICE OF APPEAL AND
SUBMISSIONS AGAINST THE "DECISION ON PROSECUTION'S MOTION
FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE"**

Office of the Prosecutor:

Luc Côté
James C. Johnson
Raimund Sauter

**Court Appointed Counsel for Moinina
Fofana**

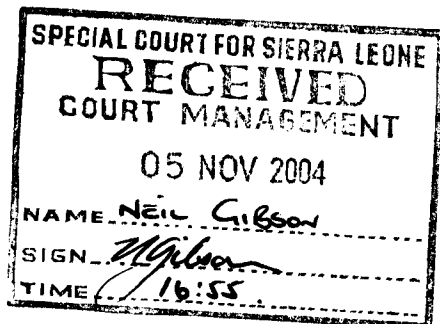
Michiel Pestman
Arrow J. Bokarie
Victor Koppe

**Court Appointed Counsel for Samuel
Hinga Norman**

Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.
Quincy Whitaker

**Court Appointed Counsel for Allieu
Kondewa**

Charles Margai
Yada Williams
Ansu Lansana



PROSECUTOR **Against** **SAMUEL HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA
(Case No. SCSL-2004-14-T)

PROSECUTION RESPONSE TO FOFANA “NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE ‘DECISION ON PROSECUTION’S MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE’”

I. INTRODUCTION

1. The Prosecution apologizes to the Court for filing these submissions one day late as required under the “Practice Direction for Certain Appeals before the Special Court”, dated 30 September 2004. The Prosecution respectfully requests the Appeals Chamber to accept these submissions for consideration. The Prosecution incorrectly applied the 14 day time limit for filing submissions as specified in Rule 112 of the Rules of Procedure and Evidence.

II. PROCEDURAL HISTORY

2. On 2 April 2004, the Prosecution filed a “Motion for Judicial Notice and Admission to Evidence” (“**the Prosecution Motion**”) pursuant to Rules 73, 89, 92*bis* and 94 of the Rules of Procedure and Evidence of the Special Court (“**the Rules**”). The First and the Third Accused filed written responses to the Motion. The Second Accused failed to do so, but responded orally during the Pre-Trial Conference, held on 28 April 2004.
3. On 2 June 2004, the Trial Chamber rendered the “Decision on the Prosecution’s Motion for Judicial Notice and Admission of Evidence” (“**the Decision**”), which granted the Motion in part.
4. In the “Corrigendum to Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”, dated 23 June 2004, the Trial Chamber ordered that the reference to (F) in subparagraph 32(i) of the Decision be deleted and that certain corrections be made with regard to the numbering of documents.

5. On 7 June 2004, the Defense for Fofana and the Defense for Kondewa filed a “Joint Request of Second and Third Accused for Leave to Appeal against Decisions on Prosecution’s Motion for Judicial Notice”.
6. On 19 October 2004, the Trial Chamber granted the Second Accused Fofana leave to appeal against the impugned decision but denied the Third Accused Kondewa leave to appeal in respect of the same.
7. On 28 October 2004, the Defense for Second Accused (“**the Fofana Defence**”) has filed “Notice of Appeal and Submissions against the Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence” (“**the Fofana Appeal**”).¹

III. SUBMISSIONS OF THE SECOND ACCUSED

8. As held by the Trial Chamber in its Decision, facts that qualify for judicial notice:
 - (a) must be relevant to the case of the Accused person(s);
 - (b) should not be subject to reasonable dispute;
 - (c) should not include any legal findings or characterizations; and
 - (d) should not attest to the criminal responsibility of any of the Accused.
9. During the Pre-Trial Conference of 28 April 2004, Defence Counsel for Fofana orally accepted propositions B, P and W from the Prosecution’s list as facts of common knowledge. The Fofana Defense stated that it does not accept the contents of any of the documents listed in the Prosecution’s Motion.
10. According to their submissions, the Fofana Defence does not appear to object to the legal criteria to identify facts of common knowledge under Rule 94(B), which was established by the Trial Chamber in its Decision of 2 June 2004. Rather, the Fofana Defence alleges that the Trial Chamber erred in its application of the said criteria in determining those facts for which judicial notice was taken.
11. Specifically, the Fofana Defense challenges judicial notice of those facts as listed under A, D, H, K, L, M and U of Annex I to the Decision. (Consequently facts B,

¹ Registry Page Number 10060 – 10066.

E and W are accepted. As far as fact “P” is mentioned in the Fofana Appeal,² there appears to be a spelling mistake since no reference is made to a fact “P” within Annex I of the Decision.) In fact, the Fofana Defense submits that all of the above-listed facts are subject to a “more than reasonable dispute”.³

12. In furtherance of its submissions, the Fofana Defense argues that:

- a) fact L attests to the criminal responsibility; and
- b) facts A, D and H include legal findings or characterizations that constitute elements of crimes under Article 3 of the Statute of the Special Court (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II).

13. Concerning those documents listed under Annex II to the Decision, the Fofana Defense restricts their Appeal to the taking of judicial notice of the contents of the Security Council Resolutions listed under Annex II to the Decision Part II.

14. The Fofana Defense is of the opinion that the Security Council Resolutions listed under Annex II to the Decision do not meet the criteria for the taking of judicial notice set up by the Trial Chamber because they:

- a) also include facts that are subject to reasonable dispute; and
- b) contain legal findings or characterizations.

IV. PROSECUTION RESPONSE

15. The Prosecution submits that the Fofana Defence fails to support the arguments outlined in the Fofana Appeal with any legal authority or sound application of the criteria established under the Decision, and therefore should be dismissed.

Facts A, D, H, K, L, M and U

16. In the Fofana Appeal, the Fofana Defense does not substantiate its assertion that the facts listed under A, D, H, K, L, M and U of Annex I to the Decision are contestable or disputed. Rather, the Fofana Defence merely makes the assertion

² See paragraph 10, Registry Page Number 10062.

³ See paragraph 14, Registry Page Number 10063.

that such facts are disputable and proceeds to describe the legal consequences of their having been judicially noticed.

17. Accordingly, the Prosecution submits that it is not in a position to substantially respond to the assertion. The Prosecution reiterates the submissions elaborated in the:

- a) Prosecution Motion, dated 2 April 2004;
- b) Prosecution “Reply to Defense Response to Prosecution Motion for Judicial Notice and Admission of Evidence”; and
- c) Prosecution “Response to Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”.

18. The Prosecution submits that none of the facts listed under A, D, H, K, L, M and U of Annex I to the Decision can be the subject of reasonable dispute. As submitted in the Prosecution Motion Each of these facts are of common knowledge as defined in the *Semanza* Decision⁴ and therefore qualify for judicial notice.

19. In the *Semanza* Decision, the Trial Chamber of the International Tribunal for Rwanda (“ICTR”) held that “facts of common knowledge” encompass 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”.⁵

20. 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 United Nations and its affiliated bodies. Citing scholarly writings, the Trial Chamber in the *Semanza* Decision specified that historical facts qualify as facts of common knowledge if they are “so notorious, or clearly established or susceptible to

⁴ *Prosecutor v. Semanza* ICTR-97-20-T, “Decision on the Prosecutor’s motion for Judicial Notice and Presumption of Facts Pursuant to Rules And 54”, 3 November 2000 (hereinafter “*Semanza Decision on Judicial Notice*”).

⁵ *Semanza* Decision on Judicial Notice, para 31.

determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary”.⁶

21. At least facts listed under A, H, K and U completely meet these requirements since they are clearly established or susceptible to determination by reference to readily obtainable and authoritative sources namely the United Nations.
- a) **Fact A** *inter alia* forms contents of the Report of the Secretary-General on the Situation in Sierra Leone, 21 November 1995, S/1995/975, para 2.
 - b) **Fact H** *inter alia* forms contents of the Fourth Report of the Secretary General on the Situation in Sierra Leone, 18 March 1998 (S/1998/249), para 6. and Resolution 1270 (1999), adopted by the Security Council at its 4054th meeting on 22 October 1999 (S/RES/12702)
 - c) **Fact K** *inter alia* forms contents of the Second Progress Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, 16 October 1998 (S/1998/960), para 5;
 - d) **Fact U** *inter alia* forms contents of the Third Report on the Secretary-General on the Situation in Sierra Leone, 5 February 1998 (S/1998/103), para 10.
22. The Prosecution submits that Fact D is also not subject to dispute. Fact D arises out of Article 3(1) of the Convention (IV) to the Protection of Civilian Persons in the Time of War, Geneva 12 August 1949, the Protocol Additional to the Geneva Conventions of 12 August 1949, and also relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).
23. The Prosecution denies the Fofana Defence argument that fact L attests to the criminal responsibility of the Accused Fofana. The fact that the Accused Fofana held the title of the National Director of War within the CDF does not imply in any way that he was involved in criminal acts. Indeed, judicial notice of this fact does not relieve the Prosecution of its burden to demonstrate that the Accused Fofana in his capacity as the National Director of War was also responsible for the crimes that are alleged by the Prosecution. In sum, there is not a criminal

⁶ *Semanza* Decision on Judicial Notice, para. 25.

connotation to holding a particular title in the absence of an admission that the holder of that title has committed the crimes charged.

24. The Prosecution rejects the argument made by the Fofana Defence that facts A, D, H include legal findings or characterizations because they form requirements and elements of crimes under Article 3 of the Statute of the Special Court (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.
25. The Prosecution submits that the terms “armed conflict” in facts A and H and “organized armed faction” in fact D are not legal findings or characterizations, but mere facts of common knowledge, which are eligible for judicial notice. The jurisprudence makes a clear delineation between facts which constitute elements of a crime and those which constitute legal findings. While affirming the impropriety of taking notice of legal findings⁷, the Trial Chamber of the ICTR in the *Semanza* Decision maintained that it could, “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...”⁸

B. Security Council Resolutions

26. The Prosecution submits that the Trial Chamber properly took judicial notice of the contents of Security Council Resolutions.
27. In the *Semanza* Decision, the Trial Chamber of the ICTR took judicial notice not only of the existence and authenticity of the pertaining Security Council Resolutions but also of their contents.⁹ The Prosecution submits that the Fofana Defence illogically attempts to distinguish the *Semanza* Decision, by noting that the Trial Chamber of the ICTR’s explanation was that the Security Council was a United Nations organization, which had established the said Tribunal.
28. The Prosecution submits that the relevance of the explanation by the Trial Chamber lies in its implied confirmation of the credibility of the body issuing the Resolution, and therefore of the reliability of its contents. The fact that the Special Court for Sierra Leone was been established by the Security Council does

⁷ *Semanza*, para 35.

⁸ *Semanza*, para 30.

⁹ *Semanza* para 38.

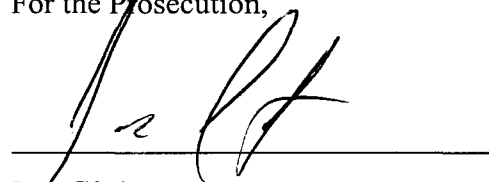
not in any way detract from the reliability of the content of Security Council resolutions.

CONCLUSION

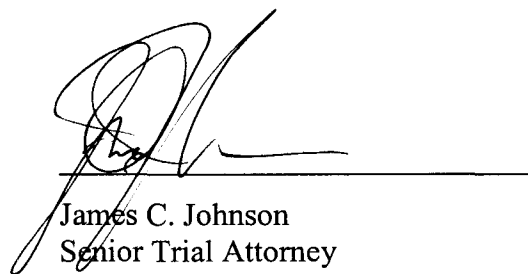
29. For the foregoing reasons, the Prosecution submits that the Appeals Chamber dismiss the Fofana Appeal.

Filed in Freetown, 5 November 2004

For the Prosecution,



Luc Côté
Chief of Prosecutions



James C. Johnson
Senior Trial Attorney