

TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

SEIZED OF the *Prosecution's Consequential Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(C)*, filed on the 24th of June, 2005 ("Motion"), whereby the Prosecution requests that the identified portions of the documents presented in three bundles and attached in Annex A-I to the Motion¹ be admitted into evidence under Rules 92bis and 89(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules")²;

NOTING the Prosecution submissions presented in the chart attached in Annex-A-II to their Motion;

NOTING the *Joint Defence Objections to Prosecution's Consequential Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)*, filed on the 29th of June, 2005 ("Response") objecting to admission of all documents in three bundles, except Document 54 from the Second Bundle;

NOTING the Defence objections presented in the chart attached in Annex A to their Response;

NOTING the *Prosecution Reply to Joint Defence Objections to Consequential Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(C)*, filed on the 4th of July, 2005 ("Reply");

NOTING oral submissions of the Parties during the court proceedings on the 6th of July, 2005;

MINDFUL OF the Chamber's *Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence*, delivered on the 2nd of June, 2004 ("Decision on Judicial Notice");

CONSIDERING the Appeals Chamber's *Fofana – Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence"*, delivered on the 16th of May, 2005 ("Appeals Decision on Judicial Notice");

NOTING that Rule 89 of the Rules provides that:

Rule 89: General Provisions

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

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

(C) A Chamber may admit any relevant evidence.

NOTING that Rule 92bis of the Rules provides that:

¹ Annex A-I, First Bundle "Rule 92bis and 89(C) submissions of certain documents received in the Judicial Notice Decision, 2 June 2004, for Existence and Authenticity"; Second Bundle "Rule 92bis submissions of evidential material submitted in support of the Judicial Notice Request of facts D, K, L, M and U which were over turned on appeal"; Third Bundle "Rule 92bis and 89(C) submissions of certain documents for admission from exhibits list not otherwise rendered at trial".

² Note that the Prosecution request that all documents listed in the Second Bundle be admitted into evidence under Rule 92bis only and not also Rule 89(C).

Rule 92bis: Alternative Proof of Facts

- (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
- (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
- (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

NOTING that Rule 89(C) vests the Trial Chamber with discretionary power to admit any relevant evidence;³

CONSIDERING that the standard for admitting evidence under Rule 92bis of the Rules is more flexible as it prescribes that for the evidence to be "relevant to the purpose for which it is submitted", its "reliability" should be "susceptible of confirmation", which is a standard quite different from Rule 92bis standard in ICTY and ICTR Rules of Procedure and Evidence;⁴

NOTING that the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined at the end of the trial when assessing probative value of the totality of the evidence;⁵

CONSIDERING however, that this "flexibility" should not lead the Chamber to admit "evidence where its probative value is manifestly outweighed by its prejudicial effect";⁶

NOTING the interpretation of Rule 92bis of the Rules, given by the Appeals Chamber, which provides guidance to the Chamber's interpretation of this Rule:

SCSL Rule 92bis is different to the equivalent Rule in the ICTY and ICTR and deliberately so. The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92bis in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities. The effect of the SCSL Rule is to permit the reception of "information" - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation". This phraseology was chosen to make clear that proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course."⁷

³ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, para. 6.

⁴ ICTY and ICTR Rule 92bis is designed for admission of a written statement of a witness and/or a transcript from a witness' previous testimony before the Tribunal in lieu of the oral testimony.

⁵ See e.g. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-AR65, Fofana - Appeal Against Decision Refusing Bail, 11 March 2005 at paras 22-24.

⁶ See e.g. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005, paras 7 and 8.

⁷ Appeals Decision on Judicial Notice, para. 26.)

CONSIDERING that proof of reliability is not a condition for admitting "information" under Rule 92bis and that a requirement under this Rule of such information being capable of corroboration in due course leaves open the possibility for the Chamber to determine the reliability issue at the end of the trial in light of all evidence presented in the case and decide whether the information is indeed corroborated by other evidence presented at trial,⁸ and what weight, if any, should the Chamber attach to it;

CONSIDERING therefore, that what is required of the Chamber at this stage in deciding to admit or reject highlighted portions of the documents tendered by the Prosecution, is to determine whether they are relevant, possess sufficient indicia of reliability and whether their admission would not prejudice unfairly the Defence;

CONSIDERING that the Accused will be unfairly prejudiced if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity of cross-examination and noting in this regard view of *May and Wierda* that:

[...] [A]s a matter of practice, Trial Chambers still prefer to hear evidence on the acts and conduct of the accused from live witnesses who can be cross-examined. [...] The trend which may, therefore, be discerned is for a preference for live testimony on matters pertaining directly to the guilt or innocence of the accused. This practice allows the accused to examine witnesses against him [...].⁹

NOTING that in defining what constitutes the evidence which goes to prove acts and conduct of the accused, the Chamber takes guidance from the case-law of the ICTY, where it was held that "the phrase, 'acts and conduct of the accused' is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused"¹⁰ and that the fact of the conduct being that of co-perpetrators or subordinates is relevant in determining if cross-examination should be allowed and not in deciding if a document should be admitted;

CONSIDERING that the international tribunals admit documentary evidence in various forms, when such evidence is: "(a) "crime-base" evidence; (b) whether there was a widespread and systematic attack on a civilian population; (c) issues of command structure (leaving aside, however, whether a particular accused exercised the role of a commander); and (d) whether crimes occurred in the context of an international armed conflict";¹¹

CONSIDERING that in the jurisprudence of the international tribunals "newspaper articles generally are not considered a reliable source of evidence and are often excluded for lack of probative value";¹²

CONSIDERING that admissibility of books, journals and newspapers "will depend on the circumstances of the particular occasion and the significance of the evidence" and such evidence will

⁸ For example, in the *Kovacevic* case, the ICTY Trial Chamber admitted the report from a member of the Commission of Experts, including analysis, but the Chamber explicitly stated that there was no question of the defendant being convicted on any count based on this evidence alone, *Prosecutor v. Kovacevic*, transcript 6 July 1998, p. 71.

⁹ *May and Wierda*, *International Criminal Evidence*, 2002, para. 10.54, p.p. 343-344.

¹⁰ *Prosecutor v. Milosevic*, Decision on Prosecution Request to Have Written Statements Admitted under Rule 92bis, 21 March 2002, para. 22.

¹¹ *May and Wierda*, para. 10.59, p. 346.

¹² *May and Wierda*, para. 7.105, p. 248; see also *Prosecutor v. Kvočka et al.*, Decision on Zoran Zigic's Motion for Rescinding Confidentiality of Schedules Attached to the Indictment Decision on Exhibits, 19 July 2001.

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not be admitted "if it [is] related to some crucial issue in the case" but more likely will be admitted "if it deals with matters by way of background";¹³

CONSIDERING that in its Decision on Judicial Notice, the Chamber has taken judicial notice of the "existence and authenticity" of the Reports of the UN Secretary General and other UN reports, which are enumerated in Annex II part I to that Decision, but not of their "contents";

NOTING that Rule 66(A)(i) of the Rules, states that the Prosecutor shall:

Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92bis at trial.

NOTING that documents from the First and Second Bundles were submitted by the Prosecution as part of its application for judicial notice on the 2nd of April, 2004;¹⁴

NOTING that all documents submitted by the Prosecution in the First, Second and Third Bundles were disclosed as documentary exhibits to the Defence as part of its disclosure obligation on the 26th of April, 2004,¹⁵ pursuant to the Chamber's order;

CONSIDERING that although the Prosecution represented at the outset of trial that there were no 92bis documents that it would seek to introduce, it did disclose all exhibits that it intended to offer, which include all the documentary evidence it now seeks to tender through Rule 92bis of the Rules, and that the Prosecution failure to "ear-mark" documents as Rule 92bis, pursuant to Rule 66(A)(i) of the Rules, does not result in any prejudice to the Defence;

CONSIDERING further, that the Prosecution has complied with its obligations under Rule 92bis(C), by giving a 10 days notice to the Defence of its intention to tender these documents as evidence under Rule 92bis and the Defence had five more days to bring their objections;

PURSUANT TO Rules 89(C) and 92bis of the Rules;

THE CHAMBER GRANTS the Motion in respect of the identified portions of the documents enumerated in Annex to this Decision, which embodies some of the documents contained in the First, Second and Third Bundles of Annex A-I of the Motion and **DENIES** the Motion in respect of all other portions of documents or documents contained in the aforesaid Annex A-I of the Motion and not listed in the Annex to this Decision;

ORDERS the Prosecution to file with the Court Management the final version of Document 58 "Sierra Leone Conflict Mapping Program" produced by No Peace Without Justice, namely, identified

¹³ *May and Wierda*, para. 10.59, p. 346.

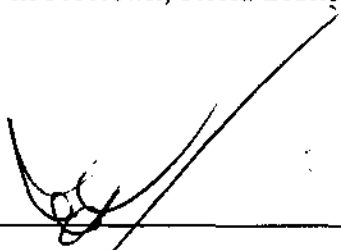
¹⁴ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-PT, Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 April 2004, Annex B.

¹⁵ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-PT, Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004, 26 April 2004, Cover Sheet 4 and 5.

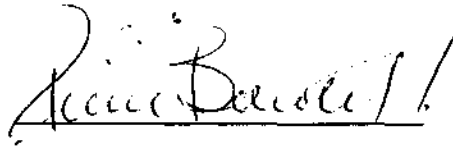
admitted portions as enumerated in Annex to this Decision, as they directly correspond to the final version of this report;

ORDERS the Registry to allocate Exhibit numbers to these identified admitted portions of the documents as listed in Annex to this Decision;

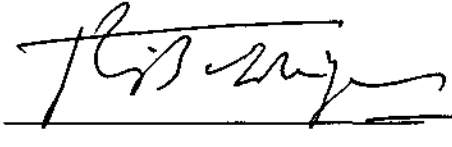
Done in Freetown, Sierra Leone, this 14th day of July, 2005



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Boutet
Presiding Judge,
Trial Chamber I



Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]



ANNEXFIRST BUNDLE

TITLE	DATE	SOURCE	ADMITTED PORTIONS
11. Third Report of the Secretary General on the Situation in Sierra Leone	05/02/98	UN Security Council	<u>Paragraph 10</u> <u>Paragraph 11</u> , ending with "armament or distribution of the CDU forces," <u>Paragraph 25</u>
13. Fifth Report of the Secretary General on the Situation in Sierra Leone	09/06/98	UN Security Council	<u>Paragraph 23</u> <u>Paragraph 38</u>
14. First Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone	12/08/98	UN Security Council	<u>Paragraph 16</u> <u>Paragraph 43</u> <u>Paragraph 59</u>
15. Second Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone	16/10/98	UN Security Council	<u>Paragraph 23</u>
16. Third Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone	16/12/98	UN Security Council	<u>Paragraph 39</u>
18. Sixth Progress Report of the Secretary General on the United Nations Observer Mission in Sierra Leone	04/06/99	UN Security Council	<u>Paragraph 35</u> , ending with "to have lost their lives." <u>Paragraph 36</u>
32. Sierra Leone	31/07/99	UNICEF	Page 3, paragraph 1 starting from "On

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Monthly Report		28 th June the Civil Defence Force..." and ending with "as part of its relief and rehabilitation programme."
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SECOND BUNDLE

TITLE	DATE	SOURCE	ADMITTED PORTIONS
42. Sierra Leone: Sowing Terror. Atrocities against Civilians in Sierra Leone	Vol. 10, No. 3 (A) July 1998	Human Rights Watch	<p>Page 24, paragraphs 1, 2, 3 ending with "and their civilian supporters."</p> <p>Page 25:</p> <p>Paragraph 2 starting from "Recruitment of Child Soldiers" and ending with "in the eastern Kailahun district alone numbered 3,000"</p> <p>Paragraph 3 starting from "The situation for child combatants" and ending with "ECOMOG, U.N. agencies, and relevant NGOs."</p> <p>Paragraph 4 starting from "National and international human rights..." and ending with "or Sierra Leonean society."</p> <p>Paragraph 5 starting from "Many former combatants," and ending with paragraph 1 on page 26 "the success of this program could play a crucial role in preventing future human rights abuses."</p>
57. Mazurana and Carlson, From Combat to Community: Women and Girls of Sierra Leone	January 2004	Women Waging Peace, Policy Commission	<p>Page 11: paragraphs 1 to 6 and 8</p> <p>Paragraph 7 starting from "As the war progressed..." and ending with "and logistical support" and from "the CDF did not feature prominently..." and ending with "over the president's hold on authority."</p> <p>Page 12</p> <p>Page 13</p>
58. Sierra Leone Conflict Mapping Program, Draft Copy for Review	9 March 2004	No Peace Without Justice	<p>Page 298</p> <p>Page 299</p> <p>Page 309</p> <p>Page 323, last two paragraphs starting from "The Kamajors - 1996" and ending with paragraph 1 on page 324</p>

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			<p>ending with "Those men must willingly contribute condiments to the Kamajors."</p> <p><u>Page 393</u></p> <p><u>Page 425</u>, starting from "b. Bonthe District" and until the end.</p> <p><u>Page 464</u></p> <p><u>Page 465</u>, from the beginning until last three lines, ending with "most of the actions were concentrated in the north of the District."</p> <p><u>Page 466</u>, last paragraph starting from "2. Factual analysis" and until the end of Page 467</p> <p><u>Page 477</u></p> <p><u>Page 478</u></p>
68. CDF Calendar 2001	None	Sierra Leone Action Movement	<u>Entire document</u> , pages 00000837 to 00000862

THIRD BUNDLE

160. Declaration of commitment to release child combatant	22 March 2000	None	<u>Entire document</u> , 2 pages.
168. Sierra Leone Humanitarian Situation Report	15 June 1998	www.reliefweb.int	<u>Paragraph 13</u>
172. Sierra Leone Humanitarian Situation	7 August 2000	www.reliefweb.int	<p><u>Page 2</u>, paragraph 3 starting from "The region was generally calm." And ending with "in Sorogbema, Pujehun district."</p> <p><u>Page 11</u>, paragraph 5 starting from "We've also documented many cases..." and ending with "the report said."</p> <p><u>Page 12</u>, paragraph 3 starting from "CDF: There are continuing reports..." and ending with "RUF rebels by the CDF."</p>
202. Sierra Leone - Childhood - A	31 August	Amnesty International,	<u>Page 3</u> , paragraph 3 starting from "Children have fought with..." and

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casualty of Conflict	2000	AFR	ending with "the government of President Kabbah." <u>Page 9</u> , starting from paragraph 5 "Child combatants recruited by the CDF..." and ending with paragraph 1 on page 10 "to show that the CDF were effective." <u>Page 22</u> , paragraph 4 starting from "Since May 2000 combatants..." and ending with "the AFRC and the CDF."
207. World Report 1999: Sierra Leone, Human Rights Development	No date (presumably referring to events in 1998)	Human Rights Watch	<u>Page 1</u> , last paragraph starting from "Civilian Defense Forces (CDFs)," and ending with paragraph 1 on page 2 "or other payment at roadblocks." <u>Page 2</u> , paragraph 2 starting from "There were also many child soldiers..." and ending with "at least until July."
222. Children- SL Militia Admits Recruiting Child Soldiers	29 June 1998	Inter Press Service, Lansana Fofana	<u>Entire document</u> , 2 pages.