SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

Before:	Judge Teresa Doherty, Presiding Judge Judge Richard Lussick Judge Julia Sebutinde
Interim Registrar:	Lovemore Munlo
Date:	25 October 2005

PROSECUTOR	Against	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-PT)

DECISION ON THE PROSECUTION MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE

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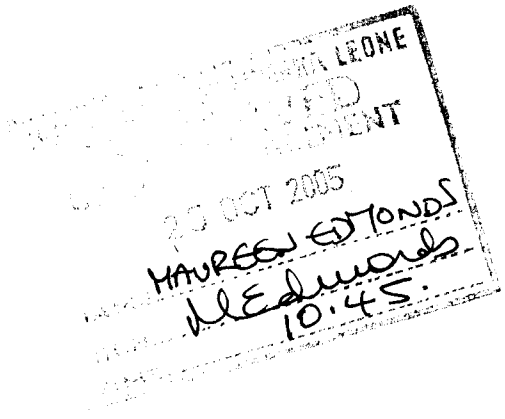

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEIZED of the "Motion for Judicial Notice and Admission of Evidence" filed by the Prosecutor on 2 April 2004 ("Motion");

NOTING that the Defence did not file any response to the Motion;

NOTING the Decision of the Appeals Chamber "Fofana – Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', dated 16 May 2005 ("*Fofana*")[1];

NOTING the Scheduling Order on Judicial Notice Motion, dated 27 May 2005 directing the parties to file further submissions in the light of the said Appeals Chamber decision;

NOTING the Prosecution's Consequential Submissions on the Motion for Judicial Notice and Admission of Evidence, filed on 6 June 2005 ("Consequential Submissions")

NOTING the Joint Defence Response thereto, filed on 9 June 2005; ("Response");

CONSIDERING the provisions of Rules 89, 92*bis* and 94 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

DECIDES the Motion solely on the written submissions of the parties pursuant to Rule 73 of the Rules.

I. BACKGROUND

1. The Prosecution filed the Motion pursuant to Rules 73, 89, 92bis and 94 of the Rules on 2 April 2004. At that time, Trial Chamber II had not yet been established. Initially, none of the Accused persons filed a response to the Motion.

2. On 1 April 2004, the Prosecution in the case of Prosecutor v. Norman et al filed a motion for judicial notice.[2] Trial Chamber 1 delivered its decision on 2 June 2004, with a Corrigendum on 23 June, 2004.[3] A motion for leave to appeal that decision was filed on behalf of two of the Accused, Fofana and Kondewa on 7 June 2004.[4] Trial Chamber I granted leave on 20 October 2004 to Fofana,

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[1] *Prosecutor v. Norman, Kondewa, Fofana*, Case No. SCSL-2004-14-AR73, Fofana – Appeal against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 16 May 2005.

[2] *Prosecutor v. Norman, Kondewa, Fofana*, Case No. SCSL-2004-14-T, Prosecution Motion for Judicial Notice, filed on 1 April 2004.

[3] *Prosecutor v. Norman, Kodewa, Fofana*, Case No. SCSL-2004-14-T, Decision on Prosecution Motion for Judicial Notice, 2 June 2004.

[4] *Prosecutor v. Norman, Kondewa, Fofana*, Case No. SCSL-2004-14-T, Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution Motion for Judicial Notice, filed on 7 June 2004.

but rejected the application of Kondewa.[5] A Notice of Appeal was subsequently filed by Fofana on 28 October 2004.[6]

3. This Trial Chamber later decided to await the outcome of that appeal in order to ensure consistency in its own decision with the ruling of the Appeals Chamber. The decision of the Appeals Chamber in Fofana was delivered on 16 May 2005. On 27 May 2005 this Trial Chamber issued a Scheduling Order directing the parties to file further submissions in the light of the Appeals Chamber decision. The Prosecution subsequently filed Consequential Submissions on 6 June 2005, to which a Joint Defence Response was filed on 9 June 2005.

II. SUBMISSIONS OF THE PARTIES

Prosecution

4. The Prosecution originally requested the Trial Chamber to take judicial notice under Rule 94(A) of the Rules of the facts contained in Annex A and in the documents listed in Annex B to the Motion. In the alternative, it requested that these facts be admitted into evidence under Rules 89(B) and (C) and 92bis of the Rules. (This original application was later amended by Consequential Submissions – see below.)

5. The Prosecution begins its submissions by pointing out that the doctrine of judicial notice serves to expedite proceedings and promote judicial economy in keeping with the object and purpose of the Special Court and its limited time frame and budget.

6. It submits that it is mandatory for the Trial Chamber under Rule 94(A) to take judicial notice of 'facts of common knowledge'. It relies on the interpretation of such facts given in *Semanza* as meaning "those facts which are not subject to reasonable dispute, including common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature"[7] and which encompass "those facts that are generally known within a tribunal's territorial jurisdiction", there being "no requirement that a matter be universally accepted in order to qualify for judicial notice."[8]

7. Furthermore, the Prosecutions says, it is the established practice of international criminal tribunals to take judicial notice of facts contained in authoritative documents , such as those of the UN and affiliated bodies. The Prosecution cites *Semanza* as authority for the proposition that historical facts qualify as facts of common knowledge if they are "so notorious, or clearly established

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[5] *Prosecutor v. Norman, Kondewa, Fofana*, Case No. SCSL -2004-14-T, Decision on Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution Motion for Judicial Notice, dated 19 October 2004 but filed on 20 October 2004.

[6] *Prosecutor v. Norman, Kondewa, Fofana*, Case No. SCSL -2004-14-T, Notice of Appeal and Submissions Against the Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence on Behalf of Moinina Fofana, filed on 28 October 2004.

[7] *The Prosecutor v. Semanza*, Case No. ICTR-97-20-1, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 23.

[8] *Ibid.*, para. 31.

or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary."[9]

8. The Prosecution goes on to submit that the definition of 'common knowledge' may extend beyond factual findings to include legal conclusions drawn from facts of common knowledge and that the Trial Chamber must judicially notice these conclusions, so long as they do not prejudice the accused by going to proof of guilt.

9. As an alternative argument, the Prosecution urges the Trial Chamber to judicially notice or admit the evidence pursuant to Rules 89 and 92*bis*. It submits that Rule 89(B) of the Rules provides a legal basis for the Chamber's discretion to take judicial notice of, or admit in evidence, certain facts when the interests of justice so require. It further submits that under Rule 89(C) the Trial Chamber has a broad discretion in determining what evidence is relevant. It refers to the principle of "extensive admissibility of evidence", underlying which is the competence of professional judges to evaluate evidence.

10. It is submitted by the Prosecution that under Rule 92*bis*, any information may be admitted instead of oral testimony provided that the "two prong test of *relevance* and the existence of a *possibility of confirming its reliability* is satisfied." It argues that the documents in Annex B to the Motion are relevant as they refer to factual allegations stipulated in the Indictments, and that since these documents are authoritative sources their reliability can be confirmed by the documents themselves or by oral testimony.

11. As mentioned earlier, following the Appeals Chamber decision in *Fofana*, the Prosecution, on the directive of the Trial Chamber, filed Consequential Submissions on 6 June 2005. In its Consequential Submissions, the Prosecution substitutes Amended Annex A for the original Annex A and requests the Trial Chamber to take judicial notice of the facts listed in Amended Annex A, relying on the reasons articulated in the original motion. It also requests the Trial Chamber to admit the information in the documents listed in Annex B pursuant to Rules 89(B) and (C) and 92bis, rather than judicially notice them. According to the Prosecution, no prejudice or unfairness to the Accused will arise from the admission of such information because the burden of proof will not be displaced, so that if the facts contained in the documents have not been proven beyond reasonable doubt – a finding that can only be made at the conclusion of all the evidence – trial judges sitting alone will exercise the appropriate forensic judgement.

Defence

12. It is clear from the Response filed by the Defence that it agrees with the Prosecution on the meaning of "facts of common knowledge" stated in *Semanza*.[10] In addition, the Defence cites the conclusion of the Appeals Chamber in *Fofana* that "facts of common knowledge under Rule 94(A) cannot be challenged during trial and that legal conclusions as well as facts which constitute legal findings cannot be judicially noticed."[11]

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[9] *Ibid.*, para. 25.
[10] See paras. 6 and 7 supra.
[11] *Fofana*, para. 32

13. The Defence then goes on to address each of the facts listed by the Prosecution in Amended Annex A by providing separate arguments on each fact, after which it gives its assessment of the admissibility of the documents in Annex B.

III. APPLICABLE LAW

14. The applicable law has been clearly stated by the Appeals Chamber in *Fofana.*[12] It is appropriate for us to restate it here since it is the law we must apply in adjudicating the case before us.

15. The general rules of evidence which the Trial Chamber must apply are contained in Rule 89, which states:

> (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.

16. The specific rule relating to judicial notice is Rule 94, which provides:

> (A) A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
>
> (B) At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings.

17. Rule 94 must be distinguished from the court's reception of information under Rule 92*bis*. We will return to Rule 92bis when we come to consider the documents listed in Annex B.

18. Pursuant to Rule 94(A), the Trial Chamber must take judicial notice of facts of common knowledge. As has been previously mentioned, the Appeals Chamber in *Fofana* accepted the interpretation in *Semanza* of 'facts of common knowledge' as meaning "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" and which encompass "those facts that are generally known within a tribunal's territorial jurisdiction". Therefore, "[u]nder the rubric of matters of common knowledge, a court may generally take judicial notice of matters so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary.".[13]

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[12] *Fofana*, at paras. 16 to 27.
[13] See *Fofana*, para. 21

19. The criteria for facts of common knowledge, as approved by the Appeals Chamber,[14] are as follows:

a) the facts are relevant to the case of the accused person;

b) the facts are not subject to reasonable dispute;

c) the facts do not include legal findings;

d) the facts do not attest to the criminal responsibility of the accused.

20. Facts of common knowledge under Rule 94(A) cannot be challenged during trial and legal conclusions as well as facts which constitute legal findings cannot be judicially noticed.[15]

IV. DELIBERATIONS

21. Having stated the applicable principles of law, we now turn to a consider the application of the criteria to each of the facts listed in Amended Annex A.

22. Before doing so, we think it is appropriate to express our opinion on the status of the authoritative sources referred to by the Prosecution in support of each fact. We agree with the view expressed by Robertson J. in *Fofana* that since the rule against hearsay does not apply to the Special Court there is no reason to treat authoritative sources as "pieces of documentary evidence received by way of exception to the hearsay rule". The preferable view is for courts to "look at such sources simply in order to equip themselves to take judicial notice." A party seeking judicial notice of a particular fact "must direct the court's attention to the range of authoritative sources which taken together demonstrate that the fact is indisputable."[16]

Facts Listed in Amended Annex A.

i) Fact A: The conflict in Sierra Leone occurred from March 1991 until January 2002.

23. The Appeals Chamber in *Fofana* held that held that this was a "notorious fact of history" and "cannot be subject to reasonable dispute".[17] Also, the fact is not opposed by the Defence. Accordingly, we take judicial notice of this fact.

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

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[14] See *Fofana*, para. 28.
[15] *Fofana*, paras. 30 to 32.
[16] *Fofana*, Separate Opinion of Justice Robertson, para. 7.
[17] *Fofana*, para. 36.

24. The Appeals Chamber held in *Fofana* that straightforward geographical facts cannot be sensibly disputed.[18] No objection has been raised by the Defence. We take judicial notice of this fact.

iii) Fact C: **Sierra Leone acceded to the Geneva Conventions of 12 August 1949 and Additional Protocol II to the Geneva Conventions on 21 October 1986.**

25. This was regarded by the Appeals Chamber as "an indisputable official fact".[19] The only objection raised by the Defence is that the statement ought to be amended to take into account that "according to the information on the website of the International Committee for the Red Cross Sierra Leone made a declaration of succession on 10 June 1965 indicating that it would abide by the 1949 Geneva Conventions which were applicable prior to its independence".

26. The wording of Fact C is somewhat ambiguous. It could be taken to mean that the Sierra Leone acceded to the Conventions and Protocol II all on the same date, i.e. 21 October 1986. Or it could be taken to mean that, having previously acceded to the Conventions, Sierra Leone later acceded to Protocol II on 21 October 1986.

27. With regard to the Geneva Conventions of 12 August 1949, the website of the International Committee of the Red Cross states:

> "In a note dated 31 May 1965 and received by the Swiss Federal Council on 10 June of that year, the government of Sierra Leone declared that State to be party to the four Conventions by virtue of their ratification by the United Kingdom of Great Britain and Northern Ireland on 23 September 1957. The Conventions entered into force for Sierra Leone retroactively as from 27 April 1961, the date on which that country became independent."[20]

Sierra Leone later acceded to Additional Protocol II to the Geneva Conventions on 21 October 1986.[21]

28. We therefore note that the Conventions entered into force retroactively to 27 April 1961 and that Sierra Leone acceded to the Additional Protocol II on 21 October 1986. Accordingly, for the sake of clarity and completeness, we take judicial notice of the fact that:

> ***Sierra Leone declared itself to be a party to the Geneva Conventions with effect from 27 April 1961 and acceded to the Additional Protocol II to the Geneva Conventions on 21 October 1986.***

iv) Fact D: **Groups commonly referred to as the RUF, AFRC and CDF were involved in the armed conflict in Sierra Leone.**

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[18] *Fofana*, Separate Opinion of Justice Robertson, para. 19.
[19] *Fofana*, Separate Opinion of Justice Robertson, para. 21.
[20] See the official ICRC website: http://www.icrc.org.
[21] See the official ICRC website: http://www.icrc.org.

29. The Defence objects to this fact being judicially noticed on the ground that it relates to legal findings which directly concern the allegations against the Accused. It is not clear whether this objection is to the names given to the groups involved, or to the fact that there was an armed conflict, or to both.

30. We note that the Appeals Chamber has clearly stated that the existence of an armed conflict is an important factual or contextual element in all war crimes by definition and therefore not a legal finding, and that, "in the context of Sierra Leone these facts cannot be subject to *reasonable* dispute taking into consideration the general knowledge of the population".[22]

31. The participation of groups identified as "RUF", "AFRC" and "CDF" in the armed conflict is referred to in many authoritative documents, such as reports of the Secretary General of the United Nations and UNHCR and by non-governmental organisations such as Human Rights Watch and Amnesty International. We can find no legal or factual reason which would support the Defence objection. Accordingly, we find that Fact D is a fact of common knowledge qualifying for judicial notice.

v) **Fact E: The RUF, under the leadership of Foday Saybana Sankoh, began organized armed operations in Sierra Leone in March 1991.**

32. The Defence objects to this fact being judicially noticed as it "relates to the proof of the Prosecution's theory in the AFRC case" - an objection which remains unexplained.

33. In support of Fact E, the Prosecution refers to a report of the Secretary-General, a UNHCR Background Paper, and papers from two well known human rights organizations.

34. In our opinion, nothing in Fact E goes to the criminality of the Accused (if that was the nature of the objection by the Defence). We find that Fact E is an historical fact not reasonably capable of dispute and, accordingly, we take judicial notice of it.

vi) **Fact F: During the ensuing armed conflict, the RUF forces were also commonly referred to as 'RUF', 'Rebels' and 'People's Army' by the population of Sierra Leone**

35. The Defence submits that this fact cannot be judicially noticed because the sources relied upon by the Prosecution do not support it. The first source is a transcript of a radio broadcast by the "RUF Spokesman, Lieutenant David Collings". Defence submits that the evidence contained in this document is not specific, that there are conflicting dates ascribed to this broadcast and that therefore the source is vague.

36. The Defence contends that the second document, a UN Department of Humanitarian Affairs Situation Report, cannot support Fact F because it does not refer to *any* date, thus making it impossible for the Defence to know which specific document is referred to among the many UN documents mentioned in the "Prosecution Filed Materials".

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[22] *Fofana*, para 36-38.

37. As regards the third document, a report of the International Crisis Group, the Defence argues that nowhere in the document can support be found for Fact F.

38. It is clear from the wording of Fact F that the Prosecution has not confined itself to any specific period of the armed conflict within which the RUF forces were allegedly being referred to as 'RUF rebels', or 'rebels', or the 'People's Army'. The wording implies that all times during the ensuing armed conflict the RUF forces were the forces commonly referred to by the population of Sierra Leone as "Rebels" and "People's Army". Moreover, apart from a reference in the final paragraph of the transcript of the broadcast ("No more RUF but the People's Army"), the source materials relied upon by the Prosecution do not make specific reference to Fact F.

39. We find that Fact F is not a fact of common knowledge, but would appear to be a disputable fact that needs to be proved at trial, and therefore cannot be made the subject of judicial notice.

vii) Fact G: **On 30 November 1996, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a Peace Agreement in Abidjan, Ivory Coast which brought a temporary cessation of active hostilities".**

40. The Defence accepts the first part of Fact G, but objects to that part which states: "which brought a temporary cessation of active hostilities". The objection is on the ground that neither of the two documentary sources referred to by the Prosecution support that assertion. The Defence is quite correct in its objection. The clause complained of is without a source and would appear to be disputable. As such, it cannot be made the subject of judicial notice. However, the signing of the peace agreement is an historical fact, and we therefore take judicial notice of the fact that:

> *On 30 November 1996, Foday Saybana Sankoh and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a Peace Agreement in Abidjan, Ivory Coast.*

viii) Fact H: **However, the active hostilities thereafter recommenced".**

41. This is an historical fact well supported by reliable sources and is not contested by the Defence. Accordingly, we take judicial notice of Fact H.

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

42. The Prosecution refers us to various resolutions of the Security Council, reports of non-government organizations and Sierra Leone Gazettes issued by the AFRC.

43. Regardless of these sources, the Defence objects to Fact I being judicially noticed on the grounds that it "relates (in)directly to the alleged criminal responsibility of the Accused. Part of the Prosecution's theory is that the Accused were allegedly involved in staging a coup against the President and to have ousted the President government (sic), to have been members of the following governing body."

44. We are of the opinion that Fact I does not directly or indirectly make any allegations or implications of fact against any of the accused. It is an historical fact beyond reasonable dispute and we take judicial notice of it

x) Fact J: **On 25 May 1997, JOHNNY PAUL KOROMA a.k.a JPK became the leader and Chairman of the ARFC**

45. This is an historical fact not disputed by the Defence and we take judicial notice of it.

xi) Fact K: **The AFRC Forced (sic) were commonly referred to as Junta by the population of Sierra Leone**

46. The Defence objects to this fact being judicially noticed for a number of reasons. Firstly, it says that "the use of the term 'commonly' by itself related to a certain level of vagueness." Next, it says that in Fact M (below), the Prosecution uses the word "Junta" to describe the combined forces of the AFRC and the RUF, so that both Facts are imprecise as to the exact meaning thereof. Lastly, the Defence says that "the term 'Junta' has a certain meaning within the Prosecution's theory on alleged criminal responsibility of the Accused".

47. The Defence has offered no explanation of why it regards the use of the word 'commonly' as "relating to a certain level of vagueness". We find that this objection is itself vague. Moreover, the Defence's other objections are misdirected, since the meaning of the word 'Junta' is not the issue. The issue is whether the AFRC forces were commonly referred to as 'Junta' by the population. The Prosecution is not asking the Trial Chamber to take judicial notice of the meaning of the word..

48. However, the sources relied upon by the Prosecution[23] do not, in our opinion, establish conclusively that the word "Junta" was commonly used by the population to refer to the AFRC forces. We find that Fact K is not a fact of common knowledge and would appear to be a disputable fact that needs to be proved at trial. It follows that it cannot be judicially noticed.

xii) Fact L: **Shortly after the AFRC seized power, at the invitation of JOHNNY PAUL KOROMA, and upon the order of FODAY SAYBANA SANKOH, the leader of the RUF, the RUF formed an alliance with the AFRC**

49. The Defence objects to judicial notice being taken of this fact on the ground that "it relates to the allegations against the Accused's (sic) purported criminal responsibility. The indictment against the Accused mentions the existence of a joint criminal enterprise between the RUF and the AFRC. This statement relates directly to that specific allegation ..." In addition, the Defence argues that the meaning of the word "alliance" is vague and cannot be considered "common knowledge".

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[23] UNHCR Report on Atrocities Committed Against the Sierra Leone Population, UNHCR Conakry Branch Office, 28 January 1999, Victim Reports Cases 1-38; Human Rights Watch, "Sowing Terror, Atrocities Against Civilians in Sierra Leone" Vol.10, No.3(A) July 1998 p.18, fn25, p.20, 23; Human Rights Watch, "Getting Away with Murder, Mutilation and Rape" Vol.11, No.3(A) June 1999, pp 10-41.

JR.

50. We note that paragraphs 33, 34 and 35 of the Further Amended Consolidated Indictment allege that the AFRC, including the Accused, and the RUF participated in a joint criminal enterprise to commit the crimes mentioned therein, an allegation which is denied by the Defence. Fact L would therefore appear to offend against one of the criteria for facts of common knowledge, that is, that "the facts do not attest to the criminal responsibility of the accused".[24] Accordingly, we find that Fact L is not a fact of common knowledge and cannot be made the subject of judicial notice.

xiii) Fact M: **The AFRC/RUF Junta forces (Junta) were also commonly referred to as 'Junta', 'rebels', 'soldiers' 'SLA', 'ex-SLA ', and 'People's Army' by the population of Sierra Leone**

51. The Defence repeats its arguments made in regard to Facts K and L above. In addition, the Defence submits that Fact M assumes an 'alliance' between the AFRC and the RUF, "which assumption will have to be proved through the legal proceeding." We agree with this submission. We might add that we do not consider that the source materials relied upon by the Prosecution put Fact M beyond reasonable dispute in any event. For this reason and the reasons given under Fact L above, we find that Fact M is not a fact of common knowledge and we decline to take judicial notice of it.

xiv) Fact N: **After 25 May 1997 coup d'etat, a governing body was created within the Junta that was the sole executive and legislative authority within Sierra Leone during the Junta**

52. The Defence objects specifically to the phrase "during the Junta" on the basis that it does not specify any time frame. The Defence submits that, for that reason, the statement as such cannot be judicially noticed.

53. Not only is a time frame not specified, but it is not clear whether the "Junta" is meant to be the Junta of the AFRC referred to in Fact K, or the Junta of the AFRC/RUF referred to in Fact M.

54. Fact N is obviously not beyond dispute and therefore cannot be a fact of common knowledge. We decline to take judicial notice of it.

xv) Fact O: **The governing body included leaders of both AFRC and RUF**

55. The Prosecution refers us to Public Notice No. 3 of 1997, published in the Sierra Leone Gazette dated 18 September (presumably 1997) and minutes of Emergency Council of the AFRC meeting held on 11 August 1997.

56. The Defence again objects on the ground that the fact in question relates to the allegations of criminal responsibility against the Accused, since the indictment specifies that they were members of the governing body. The specific objection is that "[B]y admitting this statement as a judicially noticed fact, this would automatically imply that the Prosecution – if it can prove that the Accused were

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[24] Referred to in *Fofana*, para. 28.

members of the governing body – does not have to prove separately that the Accused were leaders of the AFRC and the RUF". We do not think that this follows, since it is not claimed that every member of the governing body was a leader of the AFRC or RUF, but only that the governing body included such leaders.

57. Nevertheless, we consider Fact O follows from and is dependent on judicial notice of Facts L, M, N above, and as we have ruled that those facts cannot be made the subject of judicial notice, it must follow that we cannot take judicial notice of fact O either. We find that Fact O is not beyond dispute and is therefore not a fact of common knowledge that can be judicially noticed.

xvi) Fact P: **The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah on or about 14 February 1998. President Kabbah's government returned in March of 1998".**

58. The Prosecution's sources are a report of the Secretary General of the United Nations and on reports by UN bodies and NGOs. The Defence objects to the term "Junta", referring to their submissions in Facts K, L, and M, but does not object to the remaining part of the statement. The use of the word "Junta" in Facts K and M (we can find no reference to use of the term in Fact L) is in the context of a word said to be in common use by the population of Sierra Leone, whereas, here, it is used in a different sense as the name of a body that was forced from power. We consider Fact P to be a statement of historical fact that is not open to reasonable dispute and, accordingly, we take judicial notice of it.

xvii) **Fact Q: After the Junta was removed from power, the ARFC/RUF alliance continued**

59. The Defence objects to this Fact on the grounds that, firstly, the term 'AFRC/RUF alliance' is "highly disputable as it does not specify what the alliance would be"; secondly, that it does not specify how long the alliance continued; and thirdly, that the term 'alliance' may "serve to attest the alleged criminal responsibility of the Accused and/or the Prosecution's theory."

60. We refer to our views expressed at Facts L and M and decline to take judicial notice of Fact Q.

xviii) Fact R: **On or about 7 July 1999, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah signed a Peace Agreement in Lomé, Togo**

61. The Defence quite properly does not raise any objection, and since this is a historical fact not open to reasonable dispute, we take judicial notice of it.

62. In respect of the alleged facts which we have declined to judicially notice – namely, Facts F, K, L, M, N, O and Q – we note that the source materials referred to by the Prosecution are all included in the Documents listed in Annex B. We turn now to consider the admissibility of the information contained in those documents under Rule 92*bis* .

Information Contained in Documents Listed in Annex B

63. The Prosecution has amended the relief sought in relation to the documents in Annex B in that it is no longer seeking to have the Trial Chamber take judicial notice of the facts in those documents. It now asks that the information contained in the documents be admitted pursuant to Rules 89(B) and (C) and 92*bis* as "information of facts that are both relevant to the allegations detailed in the Indictment and susceptible of confirmation". According to the Prosecution, the majority of the documents originate from the United Nations and well-respected Non-Government Organizations, or are public documents, so that the information in them is "susceptible of confirmation" within the meaning of Rule 92*bis*.

64. In opposing the application, the Defence cites Rules 89(B) and (C) and 92*bis* and submits that: the Prosecution has not specified "to which part of the Indictment the particular documents are alleged to be relevant". It argues that "Rule 92*bis* requires 'more specificity' and that this requirements cannot satisfied simply by stating that all the documents are relevant "to the Indictments."

65. The Defence further submits that what was said by the Appeals Chamber in *Fofana* regarding documents sought to be judicially noticed, applies equally to documents sought to be admitted under Rule 92*bis*:

> *[T]he proper procedure would be to extract from the resolutions or reports the factual propositions which a party wants the Court to notice. It will then be for the Trial Chamber, after considering any defence material, to decide whether the extracted proposition really is incontrovertible.*[25]

66. The Defence points out that Annex B consists of 94 documents which the Prosecution claims are relevant, but that it is impossible for the Defence to answer such a claim unless the Prosecution specifies those parts of the documents which are alleged to be relevant. The Defence adds that unless the Prosecution specifies which parts of the documents are to be brought into evidence, it is possible that opinions, and not facts, will be admitted. We find some merit in this submission.

67. The Prosecution has sought to have the documents admitted pursuant to Rules 89(B), 89(C) and 92*bis*.[26] The general rules of evidence which the Trial Chamber must apply are contained in Rule 89, but here we are considering specifically information in lieu of oral evidence, the admissibility of which is governed by Rule 92*bis*. We note, however, that even under the more general Rule 89(C), the Prosecution would need to specify what parts of the documents it seeks to tender as relevant evidence.

68. Rule 92*bis* provides:

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

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[25] *Fofana*, para 49.
[26] See para. 8 of Prosecution's Consequential Submissions.

(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.

69. It is clear from this Rule that before the information can be admitted in evidence, the Trial Chamber must be able to form an opinion as to its relevance. It was said by the Appeals Chamber in *Fofana* that *"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. It is for the trial chamber to decide whether the information comes in a form, or is of a kind, that is "susceptible of confirmation". It follows, of course, from the fact that its reliability is "susceptible of confirmation", that it is also susceptible of being disproved, or so seriously called into question that the court will place no reliance upon it"* (emphasis added).[27] The Appeals Chamber here was clearly referring to the reception of facts contained in documents, rather than the reception of the whole of the documents themselves.

70. The Appeals Chamber, in considering what information may be admitted into evidence under the Rule, held: "Rule 92*bis* permits facts that are not beyond dispute to be presented to the court in a written or visual form that will require evaluation in due course. A party which fails in an application to have a fact judicially noticed under Rule 94(A) may nonetheless be able to introduce into evidence the sources upon which it has relied under Rule 92*bis* and at the end of the trial the court may well conclude that the fact has been proved beyond reasonable doubt. The weight and reliability of such "information" admitted via Rule 92*bis* will have to be assessed in light of all the evidence in the case."[28]

71. Annex B contains no less than 94 documents, ranging from UN Security Council Resolutions, Reports of the Secretary General, Reports of the UN Observer Mission in Sierra Leone (UNOMSIL), Reports of the UN Office for the Coordination of Humanitarian Affairs, Miscellaneous UN Reports, Reports of Non-Governmental Organizations, Sierra Leone Official Documents, other Public Documents, Maps, Peace Agreements, Treaties, and Reports of other Governments. We do not think that we are required by Rule 92*bis* to wade through this mountain of material trying to separate relevant facts from what are irrelevancies, opinions, and legal findings, in order to admit into evidence only the information that satisfies the Rule. Instead, the Prosecution should have clearly indicated on each document the passages that we are being asked to consider on the question of relevance.

72. We agree with the comments of Robertson J. in Fofana (which apply to facts in documents, whether sought to be judicially noticed or admitted under Rule 92*bis*) that : "This mass of undigested paperwork should not be imposed upon the Trial Chamber and the Defence in such an undisciplined fashion" and that "[i]t must not become a practice in this Court."[29]

73. Robertson J. also emphasised that there is a duty that rests upon a party seeking to introduce documents: "All relevant material is admissible, but that is not an invitation to parties to deluge the court with thousands of pages of NGO and UN reports. The wider admissibility provisions in the

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[27] *Fofana*, at para. 27.
[28] *Fofana*, at para. 27.
[29] *Fofana*, Separate Opinion of Justice Robertson, at para. 30.

SCSL carry a concomitant duty on the parties to narrow the documentary material they seek to introduce and to identify only those passages which are of direct relevance to the case, however interesting or insightful other aspects of the report may be."[30]

74. Since the Prosecution has not indicated on any of the 94 documents listed in Annex B the passages it claims to be relevant, we are unable to make any finding as to whether the facts sought to be put into evidence (whatever they may be) satisfy the requirements of Rule 92*bis*. We therefore rule that the information contained in the said documents is, at present, not in an admissible form.

75. Robertson J. in *Fofana*[31] prescribed the following simple procedure, which we think the Prosecution should have followed: "Any party, whether prosecution or defence, that seeks to introduce a lengthy document must indicate in the margin the passages they claim to be relevant and indeed, if judicial notice under Rule 94(A) is sought, they must identify and set out as a proposition the fact which they want judicially noticed and direct the court's attention to the assertion of that fact in any document that they present in pursuance of their application." (The requirements of this procedure which relate to judicial notice do not, of course, apply to the issue with which we are presently concerned.)

V. DISPOSITION

FOR THE FOREGOING REASONS,
THE TRIAL CHAMBER

PARTIALLY GRANTS THE MOTION AND DECIDES AS FOLLOWS:

(1) Facts A, B, D, E, H, I, J, P and R qualify for judicial notice.

(2) Facts C and G qualify for judicial notice in their judicially modified form.

(3) The alleged Facts F, K, L, M N, O and Q do not qualify for judicial notice.

(4) The Motion in respect of Annex B is denied. However, the information contained in the documents in Annex B may be considered for admission under Rule 92*bis* once the procedure prescribed above and in Rule 92*bis* (C) has been complied with.

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[30] *Fofana*, Separate Opinion of Justice Robertson, at para. 31.
[31] *Fofana*, Separate Opinion of Justice Robertson, para. 30.

Done at Freetown, Sierra Leone, this 25th day of October 2005.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]