765) SCSL-03-01-T (24690 - 24718) 24690

SPECIAL COURT FOR SIERRA LEONE

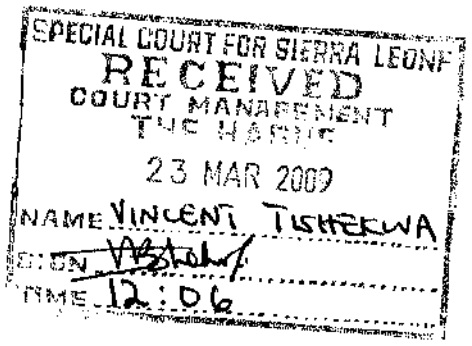
TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding Judge
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 23 March 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE APPLICATION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS FROM THE AFRC TRIAL JUDGEMENT PURSUANT TO RULE 94(B)

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Nina Jørgensen
Christopher Santora

Defence Counsel for Charles G. Taylor:
Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)", filed on 9 February 2009 ("Motion");[1]

NOTING the "Public with Annex A Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)", filed on 19 February 2009 ("Response");[2]

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94 (B)", filed on 24 February 2009 ("Reply");[3]

RECALLING the Trial Chamber Judgment in *Prosecutor v. Brima, Kamara and Kanu* ("AFRC Trial Judgement");[4]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 26*bis*, 54, 73, 85 and 94 of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES AS FOLLOWS, based solely on the written submissions of the parties, pursuant to Rule 73 A of the Rules;

I. SUBMISSIONS

1. Defence Motion

1. In its Motion the Defence requests that the Trial Chamber exercise its discretion by taking judicial notice of 15 facts which have been adjudicated upon in the AFRC Trial Judgement in the case of *Prosecutor v. Brima, Kamara and Kanu* ("AFRC Case") and which the

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[1] SCSL-03-01-T-723.
[2] SCSL-03-01-T-738.
[3] SCSL-03-01-T-743.
[4] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-628, Judgement, 20 June 2007.

Defence submits are relevant to the modes of liability with which the Accused is charged.[5] The 15 facts are set out in Annex A to the Motion, and some of them have been re-formulated or modified in paragraph 18 of the Reply. It submits that none of the proposed adjudicated facts are contentious or involve legal conclusions.[6] The Defence further contends that admission of the facts would enable the Defence to streamline the evidence it would need to present during the Defence case.[7] Taking judicial notice of these facts would promote judicial economy and the harmonisation of the judgements of the Special Court.[8]

2. Relying on case law of Trial Chamber I, the Defence submits that Rule 94 has a two-fold rationale: (a) to promote judicial economy by dispensing with the need for the parties to lead evidence in order to prove supplementary facts or allegations already proven in past proceedings, and (b) to harmonise judgements in relation to certain factual issues that arise in multiple cases before the Special Court.[9] With regard to Rule 94(B) specifically, it submits that the Rule creates a "well-founded presumption for the accuracy of [the adjudicated] fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at trial."[10]

3. According to the Defence, there is settled jurisprudence on the legal criteria for determining what constitutes an adjudicated fact. These are:

a. The fact must be distinct, concrete and identifiable;
b. The fact must be relevant and pertinent to an issue in the current case;
c. The fact must not contain legal conclusions, nor may it constitute a legal finding;
d. The fact must not be based on a plea agreement or upon facts admitted voluntarily in an earlier case;
e. The fact clearly must not be subject to pending appeal, connected to a fact subjected to pending appeal, or have been settled finally on appeal;
f. The fact must not go to the acts, conduct or mental state of one of the accused persons;

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[5] Motion, para. 1.
[6] Motion, para. 2.
[7] Motion, para. 2.
[8] Motion, para. 2.
[9] Motion, para. 4, referring to *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1184, Decision on Sesay Defence Application for Judicial Notice to be taken of Adjudicated facts under Rule 94(B), 23 June 2008 ["Sesay Decision on Adjudicated Facts"], para. 17.
[10] Motion, para. 6, referring to Sesay Decision on Adjudicated Facts, para. 18.

g. The fact must not be sufficient, in itself, to establish the criminal responsibility of an accused person; and
h. The fact must not have been re-formulated by the party making the Application in a substantially different or misleading fashion; that is to say, the fact must not differ significantly from the way the fact was expressed when adjudicated in the previous proceedings, it must not have been abstracted from the context of the original judgement in an unclear or misleading manner, and it must not be unclear or misleading in the context in which it is placed in the Application.[11]

4. The Defence submits that the Trial Chamber would promote fairness and judicial economy if it were to accept the proposed facts and consequently narrow the factual issues in dispute. It avers that the rights of the Accused will be upheld by ensuring that the trial is not unnecessarily long.[12] The Defence adds that the Prosecution would not be prejudiced by any Trial Chamber decision to take judicial notice of the adjudicated facts as it could move the Trial Chamber to call witnesses to challenge any rebuttable presumption that would be created. It notes that an ICTR Trial Chamber took judicial notice of certain facts even after the Defence had presented most of its evidence.[13]

5. The Defence contends that all the proposed facts are distinct, concrete and identifiable; that they are not of a legal character; that they have not been taken out of context; and that they have not been contradicted by any finding of the Appeals Chamber; and that they are relevant to the instant case.[14]

6. The Defence submits that all 15 facts are relevant as they address the relationship between the leaders of the AFRC/RUF and/or the command structure of the two factions, and specifically, the relationship between the AFRC and RUF as it pertains to the Freetown invasion in January 1999,[15] and the fact that the RUF did not come into Freetown as a cohesive organisation between about 21 December 1998 and 28 February 1999.[16]

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[11] Motion, para. 7, referring to Sesay Decision on Adjudicated Facts, para. 19.
[12] Motion, paras 8, 9.
[13] Motion, para. 10.
[14] Motion, paras 11-13.
[15] Motion, para. 12.
[16] Motion, para. 13.

7. By reference to a Decision in the *Krajisnik* case, the Defence concludes that as long as the fair trial rights of the accused are respected, the Trial Chamber is under a duty to avoid wasting unnecessary time and resources on undisputed facts.[17]

2. Prosecution Response

8. The Prosecution opposes the Motion and submits that it should be denied,[18] on the grounds that the exercise of the Trial Chamber's discretion to take judicial notice of the proposed adjudicated facts would be contrary to the interests of justice and would not promote judicial economy and that the Defence has failed to satisfy several underlying criteria for judicial notice of adjudicated facts.[19]

9. The Prosecution points out that in contrast to Rule 94(A), according to which judicial notice is mandatory, Rule 94(B) vests the Trial Chamber with a discretionary power to take judicial notice of adjudicated facts.[20] It argues that even if this Trial Chamber were to adopt the legal criteria for taking judicial notice of adjudicated facts as laid out by Trial Chamber I, it would still retain its discretion to refuse to take judicial notice of adjudicated facts where doing so would not serve the interests of justice. It notes that the overriding consideration is whether taking judicial notice of the adjudicated fact will promote judicial economy while ensuring that the trial is fair, public and expeditious.[21]

10. The Prosecution refers to the finding of Trial Chamber I in the Sesay Decision on Adjudicated Facts, stating that the "[...] each criminal case centres on determining the guilt or innocence of a particular accused person or persons. As such, the issues, evidence and factual findings in one case cannot bind the prosecution in a different case."[22] It notes that a central issue in the instant case is the relationship between the AFRC and the RUF, concerted action between them culminating in the attack on Freetown in January 1999, and the relationship

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[17] Motion, para. 15, referring to *Prosecutor v. Krajisnik*, IT-00-39-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, 28 February 2003, paras 11-12.
[18] Response, para. 2.
[19] Response, para. 2.
[20] Response, para. 4.
[21] Response, para. 4, referring to Sesay Decision on Adjudicated Facts paras 15, 19, 21.
[22] Response, para. 5, referring to Sesay Decision on Adjudicated Facts, para. 32.

that none of the findings from the AFRC Trial Judgement at issue were contested in the parties' notices of appeal in that case, filed on 2 August 2007, and that the Defence has offered no explanation for the delay.[30]

15. The Prosecution submits that any rebuttal exercise would consume additional time and resources which would not be justified by the mere presumption of accuracy accorded to certain facts.[31] The Prosecution, therefore, submits that granting the Defence Motion would clearly disadvantage the Prosecution as it would have "presented its entire case without the knowledge of its burden to overcome a rebuttable presumption as to the veracity of certain now judicially noticed facts." Thus taking judicial notice of the proposed adjudicated facts would be contrary to the interests of justice and would not achieve judicial economy.[32]

16. More specifically, the Prosecution submits that Facts 1, 5, 6, 7 and 8 are not distinct, concrete and identifiable,[33] and that Facts 6, 9, 10, 11 and 12 lack relevance or are only tangentially relevant.[34] The Prosecution further objects to taking judicial notice of the facts at 1, 2, 3, 5, 7, and 8, contending that they include omissions and misstatements and are of a tendentious nature.[35]

3. Defence Reply

17. In reply, the Defence has slightly reformulated or amended Facts 1, 3, 5, 7 and 8 of the proposed adjudicated facts.[36]

18. The Defence contests the Prosecution claim that the adjudicated facts from the AFRC Judgment are "evidence of the Defence," when in fact a review of the AFRC Trial Judgement

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[29] Response, para. 9, footnote 31, referring to *Prosecutor v. Prlic et al.*, IT-04, 74, PT, Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94 (B), 14 March 2006.
[30] Response, para. 10.
[31] Response, para. 10, referring to *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005; *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 31; Sesay Decision on Adjudicated Facts, paras 35, 36.
[32] Response, paras 12, 14.
[33] Response, para. 16.
[34] Response, para. 17.
[35] Response, para. 18.
[36] Reply, paras 3, 17-18.

between the two groups and the Accused.[23] The Prosecution concludes that no interests of justice would be achieved by giving the proposed evidence of the Defence a presumption of accuracy and that the Trial Chamber should base its findings on the evidence before it in the current case.[24]

11. The Prosecution provides examples of the evidence given by a number of its witnesses in the instant trial regarding the relationship between the AFRC and the RUF, and the relationship between the two groups and the Accused, and argues that while some of the issues were not core issues in the *AFRC* case, they are all clearly central to the charges against the Accused. It concludes that it would therefore be improper to take judicial notice of any of the proposed facts, and in particular Facts 1, 8, 9, 12, 13, 14, and 15.[25]

12. The Prosecution submits that its witnesses in the instant case provided more detail regarding proposed Facts 3 and 7, concerning the AFRC and RUF command structures during the Junta period, and argues that the evidence in this case comes from a variety of perspectives and paints a more complete and nuanced picture than did the evidence in the AFRC case.[26] Further, Facts 2 and 5 go to core issues in the current case and therefore it would not be in the interests of justice to take judicial notice of facts relating to these central issues.[27]

13. The Prosecution, however, refers to an ICTY Decision where a Trial Chamber only took judicial notice of facts which were not the subject of reasonable dispute and not "facts which involve interpretation",[28] but also refers to case law that "[a]s a party may challenge, at trial, a fact that has been judicially noticed, it follows that a Chamber is not restricted to taking judicial notice of facts that are not the subject of disputes between the parties."[29]

14. With regard to the timing of the Defence application, the Prosecution observes that the Defence filed its Motion after the Prosecution had announced that it had called its last witness,

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[23] Response, paras 5, 7.
[24] Response, para. 6.
[25] Response, footnote 24.
[26] Response, para. 8.
[27] Response, paras 8, 9, and footnote 30, referring to *Prosecutor v. Popovic et al.*, IT-05-99-T, Decision on Prosecution Motion for Adjudicated Facts, 26 September 2006, para. 19.
[28] *Prosecutor v. Sikirica et.al.*, IT-95-8, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006.

suggests that the facts were based primarily on the testimony of Prosecution witnesses.[37] The Defence submits that there would be no harm to the Prosecution's case if the previous testimony of its witnesses, in the AFRC, were granted a presumption of accuracy in the current case.[38] The Defence adds that only one of the purposes of Rule 94(B) is judicial economy; the other is to create consistency of case law. These twin purposes need only be balanced against the right of the accused to a fair trial.[39]

19. The Defence submits that the Prosecution will not be prejudiced by the admission of the proposed facts because, as the Prosecution has conceded, it has already led a certain volume of evidence on the issues in dispute.[40]

20. With regard to the timing of the Defence Motion, the Defence stresses that Rule 94(B) imposes no restriction as to which stage in the proceedings an adjudicated facts motion should be brought. It notes that the Defence case has yet to begin and that these proposed facts will help form the basis of the Defence case. The Defence asserts that it hoped to do a joint filing of adjudicated facts from the AFRC and RUF judgements, but that delays in issuing the judgement in the latter case prevented the Defence from doing so.[41]

21. The Defence submits that the case law cited by the Prosecution supports its position that late filings are acceptable and it notes that in those cases judicial notice was taken regardless of the advanced stage of the proceedings.[42]

22. The Defence submits that the relationship between the AFRC and RUF, and any relationship between either of these organizations and the Accused, is central to the instant case, and that the Prosecution cannot argue both that the proposed facts go to issues central to the present case and lack relevance. The Defence avers that there is no prohibition on taking

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[37] Reply, para. 4.
[38] Reply, para. 4.
[39] Reply, para. 5.
[40] Reply, para. 7.
[41] Reply, para. 9.
[42] Reply, para. 10, referring to Sesay Decision on Adjudicated Facts; *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005; *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001.

judicial notice of facts that are central to a case; this is a discretionary issue.[43] The Defence argues that the fact that the relationship between the AFRC and RUF is central to the case is precisely why judicial economy will be promoted by taking judicial notice of the proposed acts, and notes that none of the proposed facts go to the relationship between the factions and the Accused.[44]

23. The Defence refers to Agreed Fact 31 in the "Joint Filing by the Prosecution and Defence Admitted Facts and Law"[45] regarding relations between the AFRC and the RUF during the Freetown invasion, and points out that the fact agreed to by the previous Defence team was simply a factual recognition that elements of the RUF may have participated in the Freetown attack, but says nothing about the RUF as a cohesive organisation.[46]

24. The Defence refutes the Prosecution objection that the proposed adjudicated facts mix principal and accessory facts.[47] Further, it disagrees that the proposed adjudicated facts are purposefully misleading and tendentious, but in light of the Prosecution's objections would be prepared to amend some of the proposed Facts 1, 2, 3, 5, 7 and 8 if the Trial Chamber deems it necessary.

II. APPLICABLE LAW

25. Rule 94 states as follows:

> **Judicial Notice** *(amended 1 August 2003)*
>
> (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.

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[43] Reply, paras 12, 13.
[44] Reply, paras 12-14.
[45] *Prosecutor v Taylor*, SCSL-03-01-PT-227, Joint Filing by the Prosecution and Defence Admitted Facts and Law, 26 April 2007.
[46] Reply, para. 15.
[47] Reply, para. 16.

26. Whereas Rule 94 does not define what constitutes an "adjudicated fact" this Court has previously held that when deciding whether or not to take judicial notice of a proposed fact as an adjudicated fact, the following criteria must be met:

a. The fact must be distinct, concrete and identifiable;

b. The fact must be relevant and pertinent to an issue in the current case;

c. The fact must not contain legal conclusions, nor may it constitute a legal finding;

d. The fact must not be based on a plea agreement or upon facts admitted voluntarily in an earlier case;

e. The fact clearly must not be subject to pending appeal, connected to a fact subject to pending appeal, or have been settled finally on appeal;

f. The fact must not go to proof of the acts, conduct, or mental state of the accused person;

g. The fact must not be sufficient, in itself, to establish the criminal responsibility of the Accused;

h. The fact must not have been re-formulated by the party making the application in a substantially different or misleading fashion; that is to say, the fact must not differ significantly from the way the fact was expressed when adjudicated in the previous proceedings, it must not have been abstracted from the context of the original judgement in an unclear or misleading manner, and it must not be unclear or misleading in the context in which it is placed in the application.[48]

27. Facts that the Trial Chamber has taken judicial notice of under Rule 94(A) need not be proven again at trial. In contrast, Rule 94(B) creates a

> "well-founded presumption of accuracy of [the proposed fact], which therefore does not have to be proven again at Trial, but which, subject to that presumption, may be challenged at [...] trial."[49]

Like all rebuttable evidence, judicially noticed adjudicated facts remain subject to challenge by the non-moving party during the course of the trial.[50]As a party may challenge, at trial, an

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[48] Sesay Decision on Adjudicated Facts, para. 19.

[49] Sesay Decision on Adjudicated Facts, para. 18; see also *Prosecutor v. Karemera* et al., ICTR-98-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 42, stating the "facts noticed under Rule 94(B) are merely presumptions that may be rebutted [...] with evidence at trial."

[50] *Prosecutor v. Popovic et. al.*, IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 21.

adjudicated fact that has been judicially noticed, it follows that the Trial Chamber is not restricted to taking judicial notice of facts that are not subject of dispute between the parties.[51]

28. Pursuant to Rule 94(B), taking judicial notice of adjudicated facts is a matter for the exercise of the Trial Chamber's discretion. Therefore, even where a proposed adjudicated fact fulfils all of the aforementioned criteria, the Trial Chamber will retain its discretion not to take judicial notice of said fact if doing so will not best serve the interests of justice.[52] Factors to be considered in that regard are the rights of the accused and judicial economy.[53]

29. The Special Court has further established that

> "the overriding consideration is whether taking judicial notice of the said fact will promote judicial economy while ensuring that the trial is fair, public and expeditious. Other relevant factors in such a determination include: the stage of proceedings at the time the Application is brought; the volume of evidence already led by the parties in respect of the proposed adjudicated facts; whether the proposed adjudicated facts go to issues central to the present case; and the nature of the proposed adjudicated facts, including whether they are over-broad, tendentious, conclusory, too detailed, so numerous as to place a disproportionate burden on the opposing party to rebut the facts, or repetitive of evidence already heard in the case."[54]

30. Rule 94(B) has two purposes. The first is to promote judicial economy by dispensing with the need for the parties to lead evidence in order to prove supplementary facts or allegations already proven in past proceedings. The second is to harmonise judgements in relation to certain factual issues that arise in multiple cases before the Special Court.[55]

III. DELIBERATIONS

1. Timing of the Defence Application

31. The Defence filed the Motion after the Prosecution announced that it would be calling its last witness. The Prosecution objects to the timing of the Motion, submitting that it has

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[51] *Prosecutor v. Prlic et. al.*, IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B), 14 March 2006, para. 10.
[52] Sesay Decision on Adjudicated Facts, para. 20.
[53] Sesay Decision on Adjudicated Facts, para. 21.
[54] Sesay Decision on Adjudicated Facts, para. 21.

already closed its case and that trial fairness would require that it be given the opportunity to consider calling "rebuttal" evidence, either before the close of its case, or in a rebuttal case.[56] Therefore the granting of the Motion would be contrary to the interest of justice and would not achieve judicial economy.

32. The Trial Chamber finds that the timing of the Motion is not in itself of sufficient concern to justify dismissal of the Motion in its entirety.[57] The Chamber notes that the Motion was filed before the opening of the Defence case and is intended to streamline the Defence case.[58] Furthermore, the Prosecution submissions, if accepted would lead to an unacceptable limitation of the application of Rule 94(B) to the pre-trial stage or to the Prosecution case. The Trial Chamber notes that Rule 94(B) itself does not contain such a limitation and that in the event that the proposed adjudicated facts are judicially noticed, the Prosecution may have the option to challenge them by cross-examining Defence witnesses or by calling rebuttal evidence. The Trial Chamber accordingly rejects an objection based on this ground alone.

2. The Proposed facts go to issues central to the present case

33. The Prosecution submits that it would be inappropriate to take judicial notice of Facts 1, 2, 3, 5, 7, 8, 9, 12, 13, 14 and 15 as they relate to central issues in this case, specifically the relationship between AFRC and the RUF.[59] In support, the Prosecution refers to a decision in the *Popovic* case before the ICTY, which states:

> "[...] some of the proposed adjudicated facts go to issues which are at the core of this case. In balancing judicial economy with the Accused's right to a fair and public trial, the Trial Chamber is of the view that a number of these facts should be excluded in the interests of justice".[60]

34. The Prosecution argues that the issues in the AFRC case were different and not central issues in that case, but are central in the present case. Whether a proposed adjudicated fact

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[55] Sesay Decision on Adjudicated Facts, para. 17.
[56] Response, para. 10.
[57] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005. The Trial Chamber also notes that the Motion in the Sesay Decision on Adjudicated Facts was filed much later than the Motion in the instant case.
[58] Motion, para. 2.
[59] Response, paras 7-9 and footnote 24.

goes to issues central to the present case is a relevant factor to be considered in determining whether the Trial Chamber should exercise its discretion to judicially notice such fact.[61] In the present case, the Trial Chamber has to examine each of the proposed facts individually in order to ascertain whether it fulfils this and other criteria for judicial notice.

3. General Considerations

35. The Trial Chamber has individually considered the proposed adjudicated facts set out in Annex A as amended in the Reply and finds that each of them is relevant and pertinent to an issue in the current case; does not contain legal conclusions or constitute a legal finding; is not based on a plea agreement or upon facts admitted voluntarily in the AFRC Case; is not subject to a pending appeal, nor is it connected to a fact pending appeal, nor has it been settled finally on appeal; does not go to proof of the acts, conduct or mental state of the Accused; and is not sufficient in itself to establish the criminal liability of the Accused.

36. The Chamber will consider in detail below, whether the proposed facts are sufficiently distinct, concrete and identifiable[62] and if they have been extracted in a manner that is not misleading.[63]

37. The Prosecution submits that the Defence, by submitting entire paragraphs rather than a specific fact, has obscured the principal facts it seeks to have judicial notice taken of, and objects specifically to proposed Facts 1, 5, 6, 7 and 8.[64] The Trial Chamber finds that proposed Facts 1, 5, 6, 7 and 8, as partly amended by the Defence in its Reply, are sufficiently distinct, concrete and identifiable.

4. Discussion

38. Having determined that the proposed facts satisfy the above mentioned general requirements, the Trial Chamber will now assess whether judicial notice may be taken of all of

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[60] *Prosecutor v. Popovic et al.*, IT-05-99-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts – With Annex, 26 September 2006, para. 19.
[61] Sesay Decision on Adjudicated Facts, para. 21.
[62] See para. 26.a) *supra*.
[63] See para. 26.h) *supra*.
[64] Response, para. 16.

the adjudicated facts proposed by the Defence and whether doing so would promote judicial economy and serve the interests of justice on a fact by fact basis.

39. Proposed Fact 1, as amended by the Defence Reply,[65] states:

> As the founders of the AFRC belonged to the Sierra Leone Army and therefore had been fighting the RUF since 1991, the coalition between the two factions following the 1997 coup was not based on longstanding common interests. Both factions officially declared that they were joining forces to bring peace and political stability to Sierra Leone. On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's Government.[66]

40. The Prosecution objects that by omitting the final line of paragraph 169 of the AFRC Trial Judgement the proposed fact is tendentious and misleading.[67] In its Reply the Defence therefore proposed to include the last sentence of para. 169 of the AFRC Trial Judgement, if the Trial Chamber deems necessary.[68] This sentence stated that: "On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's government."

41. The Prosecution, in addition, submits that this fact deals with the relationship between the RUF and AFRC and therefore goes to a central issue of the case.[69] The Trial Chamber, however, notes that the proposed fact does not discuss the relationship of these two organisations with the Accused. Furthermore, the Trial Chamber notes that the Prosecution concedes that it has led evidence on similar issues. The Trial Chamber considers that the proposed fact adds contextual elements to the evidence adduced by the Prosecution and therefore considers that taking judicial notice of proposed Fact 1 would promote judicial economy while causing no undue prejudice to the Prosecution.

42. Proposed Fact 2 states:

> [F]rom the earliest days there were tensions between the two factions and relations deteriorated over time. In October 1997, Johnny Paul Koroma ordered the arrest of two RUF leaders on charges that they were plotting with the CDF to overthrow his government. Not long after this incident, Koroma ordered the arrest of Issa Sesay, another top RUF commander, for his part in looting the Iranian Embassy in

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[65] Reply, para. 18 (a).
[66] AFRC Trial Judgement, para. 169 [footnotes omitted].
[67] Response, para. 16, Annex A.
[68] Reply, para. 18.
[69] Response, para. 7, footnote 24.

> Freetown. In response the RUF stopped attending joint meetings. In January 1998 Sam Bockarie, formally Vice-Chairman of the AFRC government in Foday Sankoh's absence, left Freetown for Kenema District because of his discontent with AFRC commanders.[70]

43. The Prosecution submits that Fact 2, which is based on para. 171 of the AFRC Trial Judgment, standing on its own is misleading. The previous paragraph in the AFRC Trial Judgement, para. 170, states that "commanders of both factions attended coordination meetings at which they planned operations and organised joint efforts to obtain arms and ammunition." Therefore, The Prosecution submits that in the absence of para. 170, Fact 2 is misleading.

44. The Trial Chamber agrees with the Prosecution submissions and finds that it may have been appropriate to take judicial notice of the adjudicated facts of both paragraphs. The Defence, however, has not proposed the inclusion of para. 170 of the AFRC Trial Judgement in its Reply.[71] Accordingly, the Trial Chamber considers that it would not be in the interests of justice to take judicial notice of proposed Fact 2 as this fact has been abstracted from the context of the AFRC Trial Judgement in a misleading manner.

45. Proposed Fact 3, as amended in the Reply,[72] states:

> The RUF and AFRC were allied in one government and worked closely together during the AFRC period, [but] the individuals continued to identify themselves as either RUF or SLA and that at an organisational level, separate commanders for each group co-existed in the Districts.[73]

46. The Defence has amended its wording of proposed Fact 3, to include the word "closely", following the Prosecution objection in its Response.

47. The Prosecution submits that the fact relates to a key issue and is misleading, as the Defence has omitted the phrase "available evidence suggests" following "AFRC period".[74] The Trial Chamber agrees with the submissions and considers that it would not be in the interests of justice to take judicial notice of proposed Fact 3 as this fact has been abstracted from the

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[70] AFRC Trial Judgement, para. 171 [footnotes omitted].
[71] Reply, para. 18 (b).
[72] Reply, para. 18 (e).
[73] AFRC Trial Judgement, para. 1655 [footnotes omitted].
[74] Response, paras 8 and 18.

context of the AFRC Trial Judgement in a misleading manner. The sentence "available evidence suggests" highlights that the Prosecution did not prove the issue beyond a reasonable doubt. Therefore, the Trial Chamber declines to take judicial notice of proposed Fact 3.

48. Proposed Fact 4 states:

> The Supreme Council did not have the collective ability to effectively control the military, as the military retained its own distinct chain of command and organisational structure.[75]

49. The Trial Chamber finds that this fact is sufficiently distinct, concrete and identifiable; is not extracted in a misleading manner and satisfies the criteria for judicial notice.

50. Proposed Fact 5, as amended by the Defence Reply,[76] states:

> Soon after the Conakry Accord was signed, hostilities resumed. ECOMOG forces attacked Freetown on 13 and 14 February 1998. The AFRC forces were not able to hold their positions and escaped through the Freetown peninsula. The government of former President Kabbah was reinstated in March 1998.[77]
>
> The retreat from Freetown was uncoordinated and without any semblance of military discipline. AFRC soldiers and RUF fighters fled with their families using either civilian cars or army vehicles. The fleeing troops passed through the villages of Lumley, Goderich, York and Tumbo. From Tumbo they crossed Yawri Bay to Fogbo. They then proceeded to Newton and Masiaka (Port Loko District). It took three to four days for the troops to reach Masiaka. This period is often referred to as "the intervention".[78]

51. The Prosecution objects to this fact stating that the retreat did not take place *following* the reinstatement of President Kabbah in March 1998. It submits that the two paragraphs together suggest that the troops did not reach Masiaka until March 1998.[79] The Trial Chamber disagrees and finds that the fact is sufficiently distinct insofar as the second paragraph[80] deals with the retreat and explains in more detail and specificity the second sentence of the first paragraph, i.e. the escape of the AFRC forces from the Freetown peninsula. The Trial Chamber is

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[75] AFRC Trial Judgement, para. 1656 [footnotes omitted].
[76] Reply, para. 18 (c).
[77] AFRC Trial Judgement, para. 175 [footnotes omitted].
[78] AFRC Trial Judgement, para. 176 [footnotes omitted].
[79] Response, Annex A.
[80] AFRC Trial Judgement, para. 176 [footnotes omitted].

therefore satisfied that this fact is sufficiently distinct, concrete and identifiable; is not extracted in a misleading manner and satisfies the criteria for judicial notice.

52. However, the Trial Chamber notes that it has already taken judicial notice of the fact that "President Kabbah's government returned to power in Sierra Leone in March 1998" pursuant to Rule 94(A).[81] The Trial Chamber considers that it is inappropriate to take judicial notice of the same fact again pursuant to Rule 94(B). The above sentence is therefore deleted from proposed Fact 5.

53. Proposed Fact 6 states:

> When SAJ Musa learned about Koroma's decision - that the AFRC soldiers should be subordinate to RUF command as part of the plan to recapture Kono District - he was furious. He would not accept the notion that untrained RUF fighters could be in charge of former soldiers, and insisted that the purpose of his group was to reinstate the army and that the RUF could not lead such a mission.[82]
>
> In addition, before the operation to recapture Kono took place, a dispute erupted over command and control issues resulting in hostilities between the two factions and the deaths of several fighters. As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.[83]

54. The Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms and that the fact is only tangentially relevant or relevant in part.[84] The Trial Chamber disagrees, as this fact deals with the relationship between two of the major warring factions in the armed conflict.

55. Trial Chamber considers that taking judicial notice of Fact 6 would promote judicial economy while causing no undue prejudice to the Prosecution. The Trial Chamber is satisfied that this fact is sufficiently distinct, concrete and identifiable; is not extracted in a misleading manner and satisfies the criteria for judicial notice.

56. Proposed Fact 7, as amended by the Defence Reply,[85] states:

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[81] *Prosecutor v. Taylor*, SCSL-03-01-T-370, Decision on the Prosecution Motion for Judicial Notice, 7 December 2007, Annex A, Fact E.
[82] AFRC Trial Judgement, para. 180 [footnotes omitted].
[83] AFRC Trial Judgement, para. 181 [footnotes omitted].
[84] Response, para. 17.
[85] Reply, para. 18 (e).

> When Johnny Paul Koroma departed for Kailahun District in March 1998, he was given to believe that he would be welcome there by the RUF. However, when he arrived in Kailahun he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. He was then stripped and searched for diamonds and his wife was sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999.[86]

57. The Prosecution submits that by omitting two sentences contained in para. 185 of the AFRC Trial Judgement, the originally proposed Fact 7 was misleading.[87] In addition it submits that the proposed fact is not clear as the last sentence of the original proposed fact made a reference to the Indictment period of the AFRC case.[88] In its Reply the Defence agreed to delete the last sentence of the originally proposed fact.[89] The Trial Chamber therefore finds that proposed Fact 7, as amended, is not misleading and now is sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution and therefore satisfies all the criteria for judicial notice.

58. Proposed Fact 8, as amended by the Defence Reply,[90] states:

> At a meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to "restore the Sierra Leone Army".[91]

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[86] AFRC Trial Judgement, para. 188.
[87] Response, para. 18, Annex A, Fact 7. The originally proposed Fact 7, which was based on paras 185 and 188 of the AFRC Trial Judgement, did not refer to the following two sentences of para. 185: "The majority of AFRC fighting forces remained in Kono District alongside the RUF troops. Although the AFRC were subordinate to the RUF, there was cooperation between them and the two factions planned and participated in joint operations."
[88] Response, para. 16, Annex A, Fact 7. The last sentence of this fact originally stated: "Koroma did not have any contact whatsoever with any of his former associates during the remaining period covered by the indictment.", see Motion, Annex A, Fact 7. The passage omitted from para. 188 of the AFRC Trial Judgement states: "*No evidence was adduced suggesting* that Koroma had any form of contact whatsoever with any of his former associates during the remaining period covered by the Indictment."
[89] Reply, para. 18 (e).
[90] Reply, para. 18 (f).
[91] AFRC Trial Judgement, paras 190, 379 [footnotes omitted].

59. In response to the Prosecution's submission that the last sentence of the originally proposed Fact 8 was misleading,[92] the Defence has amended the proposed Fact 8 in accordance with paragraph 190 of the AFRC Trial Judgement.[93]

60. The Trial Chamber finds that the amended proposed Fact 8 is now sufficiently distinct, concrete and identifiable, and that the Defence has not obscured the principal facts by submitting an entire paragraph rather than a specific fact it seeks to have judicially noticed, and that the criteria for judicial notice are satisfied.

61. Proposed Fact 9 states:

> From Colonel Eddie Town, in or around September 1998, AFRC troops staged a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition.[94]

62. The Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms and that the fact is only tangentially relevant or relevant in part.[95] The Trial Chamber finds that proposed Fact 8 is relevant to the instant case as it deals with the arms supply of one of the major rebel groups operating in the armed conflict in Sierra Leone. The Trial Chamber is therefore satisfied that this fact is sufficiently clear and satisfies the criteria for judicial notice.

63. Proposed Fact 10 states:

> In October 1998, following an armed clash with Dennis Mingo, SAJ Musa left Koinadugu District to join the advance team and prepare for an attack on Freetown. SAJ Musa did not follow the same route taken by the advance teams in his journey to the west.[96]

64. Again the Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms.[97] The Trial Chamber finds that this proposed Fact is relevant as it deals with the relationship between two senior officers of the two main warring factions in

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[92] Response, para. 16.
[93] Reply, para. 18 (f).
[94] AFRC Trial Judgement, paras 193, 384 [footnotes omitted].
[95] Response, para. 17.
[96] AFRC Trial Judgment, para. 197[footnotes omitted].
[97] Response, para. 17.

the armed conflict in Sierra Leone. The Trial Chamber is therefore satisfied that this fact is sufficiently clear and satisfies the criteria for judicial notice.

65. Proposed Fact 11 states:

> Upon his arrival in 'Colonel Eddie Town' in November 1998, SAJ Musa assumed command. He emphasised his disenchantment with the RUF and stressed that it was vital that his troops arrive in Freetown before the RUF. SAJ Musa reorganised the troops and began the advance towards Freetown. The troops passed through the villages of Mange, Lunsar, Masiaka and Newton before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG.[98]

66. The Trial Chamber considers that taking judicial notice of Fact 11 would promote judicial economy without causing undue prejudice to the Prosecution. The Trial Chamber disagrees that this fact is not relevant to the case,[99] as it deals with the organisation of one of the major warring factions in Sierra Leone. The Trial Chamber is therefore satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable and satisfies the criteria for judicial notice.

67. Proposed Fact 12 states:

> On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded the area. Musa immediately contacted Sam Bockarie, insulted him and told him that he had no right to claim that the troops approaching Freetown were RUF troops.[100]

68. The Prosecution objects to this fact, submitting that the Defence has only referred to the relevance in general terms.[101] The Prosecution further argues that this fact goes to a central issue of the case.[102] The Trial Chamber is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution. Fact 12 therefore satisfies all the criteria for judicial notice.

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[98] AFRC Trial Judgement, para. 198 [footnotes omitted].
[99] See Response, para. 17.
[100] AFRC Trial Judgement, para. 200 [footnotes omitted].
[101] Response, para. 17.

69. Proposed Fact 13 states:

> On 23 December 1998, shortly after the arrival in Benguema, SAJ Musa was killed in an explosion during an attack on an ECOMOG weapons depot.[103]

70. The Prosecution argued that proposed Fact 13 goes to a central issue of the case.[104] The Trial Chamber is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution. Fact 13 therefore satisfies all the criteria for judicial notice.

71. Proposed Fact 14 states:

> Following the death of SAJ Musa, the troops reorganised. On 5 January 1999, the Accused Brima gathered the troops in Allen Town and told them the time had come to attack Freetown. On 6 January 1999, they invaded Freetown.[105]

72. In relation to this proposed fact the Prosecution argued once again that it goes to a central issue of the case.[106] The Trial Chamber is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution and therefore satisfies all the criteria for judicial notice.

73. Proposed Fact 15 states:

> Following heavy assaults from ECOMOG, the troops were forced to retreat from Freetown. This failure marked the end of the AFRC offensive as the troops were running out of ammunition. While the AFRC managed a controlled retreat, engaging ECOMOG and Kamajor troops who were blocking their way, RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.[107]

74. The Prosecution submits that proposed Facts 15 goes to a central issue of the case as it deals with the relationship between the AFRC and RUF during the 1999 Freetown attack.[108]

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[102] Response, para. 7, para. 24.
[103] AFRC Trial Judgment, para. 201 [footnotes omitted].
[104] Response, para. 7, footnote 24.
[105] AFRC Trial Judgement, paras 202, 398 [footnotes omitted].
[106] Response, para. 7, footnote 24.
[107] AFRC Trial Judgement, para. 206 [footnotes omitted].
[108] Response, para. 7, footnote 24.

The Trial Chamber, by majority, Justice Doherty dissenting, is satisfied that this fact is relevant, sufficiently distinct, concrete and identifiable, not extracted in a misleading manner and considers that taking judicial notice of this fact would promote judicial economy, while causing no undue prejudice to the Prosecution and therefore satisfies all the criteria for judicial notice.

FOR THE ABOVE REASONS

GRANTS THE MOTION in part, and takes judicial notice of the facts listed in the Annex to this Decision and

DENIES the remainder of the Motion.

Justice Doherty appends a Separate and partly Dissenting Opinion.

Done at The Hague, The Netherlands, this 23rd day of March 2009.

Justice Teresa Doherty

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

ANNEX A

Fact	AFRC Para	Adjudicated Fact
1	169	As the founders of the AFRC belonged to the Sierra Leone Army and therefore had been fighting the RUF since 1991, the coalition between the two factions following the 1997 coup was not based on longstanding common interests. Both factions officially declared that they were joining forces to bring peace and political stability to Sierra Leone. On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's Government.
4	1656	The Supreme Council did not have the collective ability to effectively control the military, as the military retained its own distinct chain of command and organisational structure
5	175, 176	Soon after the Conakry Accord was signed, hostilities resumed. ECOMOG forces attacked Freetown on 13 and 14 February 1998. The AFRC forces were not able to hold their positions and escaped through the Freetown peninsula. The retreat from Freetown was uncoordinated and without any semblance of military discipline. AFRC soldiers and RUF fighters fled with their families using either civilian cars or army vehicles. The fleeing troops passed through the villages of Lumley, Goderich, York and Tumbo. From Tumbo they crossed Yawri Bay to Fo-gbo. They then proceeded to Newton and Masiaka (Port Loko District). It took three to four days for the troops to reach Masiaka. This period is often referred to as "the intervention".
6	180, 181	When SAJ Musa learned about Koroma's decision - that the AFRC soldiers should be subordinate to RUF command as part of the plan to recapture Kono District - he was furious. He would not accept the notion that untrained RUF fighters could be in charge of former soldiers, and insisted that the purpose of his group was to reinstate the army and that the RUF could not lead such a mission. In addition, before the operation to recapture Kono took place, a dispute erupted over command and control issues resulting in hostilities between the two factions and the deaths of several fighters. As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.
7	188	When Johnny Paul Koroma departed for Kailahun District in 1998, he was given to believe that he would be welcome there by the RUF. However, when he arrived in Kailahun he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. He was then stripped and searched for diamonds and his wife was sexually assaulted. Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999.
8	190, 379	At a meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The

		commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to "restore the Sierra Leone Army".
9	193, 384	From Colonel Eddie Town, in or around September 1998, AFRC troops staged a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition
10	197	In October 1998, following an armed clash with Dennis Mingo, SAJ Musa left Koinadugu District to join the advance team and prepare for an attack on Freetown. SAJ Musa did not follow the same route taken by the advance teams in his journey to the west
11	198	Upon his arrival in 'Colonel Eddie Town' in November 1998, SAJ Musa assumed command. He emphasised his disenchantment with the RUF and stressed that it was vital that his troops arrive in Freetown before the RUF. SAJ Musa reorganised the troops and began the advance towards Freetown. The troops passed through the villages of Mange, Lunsar, Masiaka and Newton before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG.
12	200	On one occasion during the advance, SAJ Musa and the AFRC troops heard the British Broadcasting Corporation (BBC) interview Sam Bockarie over the radio. Bockarie revealed the position of the AFRC fighting forces and explained that it was RUF troops who were approaching Freetown. Soon after, ECOMOG bombarded the area. Musa immediately contacted Sam Bockarie, insulted him and told him that he had no right to claim that the troops approaching Freetown were RUF troops
13	201	On 23 December 1998, shortly after the arrival in Benguema, SAJ Musa was killed in an explosion during an attack on an ECOMOG weapons depot
14	202, 398	Following the death of SAJ Musa, the troops reorganised. On 5 January 1999, the Accused Brima gathered the troops in Allen Town and told them the time had come to attack Freetown. On 6 January 1999, they invaded Freetown
15	206	Following heavy assaults from ECOMOG, the troops were forced to retreat from Freetown. This failure marked the end of the AFRC offensive as the troops were running out of ammunition. While the AFRC managed a controlled retreat, engaging ECOMOG and Kamajor troops who were blocking their way, RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.

SEPARATE AND PARTLY DISSENTING OPINION OF JUSTICE TERESA DOHERTY

1. I agree with the conclusions of my learned colleagues in this Decision, with the exception of two issues: (A) that the decision should have reasoned more clearly why the Trial Chamber exercised its discretion to judicially notice adjudicated facts that may go to a "central issue" of the case, and (B) the admission of proposed Fact 15.

A. Centrality of the Issue

2. Whether a proposed adjudicated fact goes to issues central to the present case is a relevant factor to be considered in determining whether the Trial Chamber should exercise its discretion to judicially notice such fact.[109]

3. The Prosecution has argued that several Facts relate to central issues in this case.[110] The majority has addressed this issue in its Decision, and nothing in this separate or dissenting opinion should suggest otherwise but, in my opinion, this element should have been further addressed in more detail. This specific element falls within the discretion of the Trial Chamber and the parties should be able to comprehend the specific reasoning for a discretionary decision. In this regard I am reminded by the Appeals Chamber Decision that unambiguously states that a Trial Chamber should "provide a reasoned opinion that, among other things, indicates its view on all those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision."[111] Therefore, I feel obliged to elaborate in more detail on this particular element.

4. In relation to the substantive issue itself, the question that arises is: what is a central issue? I note that there are three different aspects in the established test for judicial notice of adjudicated facts[112]: First, the fact has to be relevant. Secondly, and to be understood more narrowly than relevance, the Chamber may exercise its discretion even when a fact is "central"

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[109] See Majority Decision, para. 34.
[110] See Majority Decision, para. 33.
[111] *Prosecutor v. Taylor*, SCSL-03-01-T (AC), Decision on Prosecution Appeal Regarding the Decision Concerning Protective Measures of Witness TF1-168, 17 October 2008, paras 18. 19; see also *Prosecutor v. Krajisnik*, IT-00-39-A, Judgement (AC), 17 March 2009, para. 139.

to the case. Thirdly, the Chamber has no discretion, and must dismiss a fact that goes to the acts and conduct of the accused. I therefore note that a "central issue" is more than merely relevant but does not extend to the actual acts and conduct of the accused. What is "central" depends on the individual case itself and that is why the determination falls within the discretion of a Chamber.

5. The Prosecution notes that a central issue in the instant case is the relationship between the AFRC and the RUF, concerted action between them culminating in the attack on Freetown in January 1999, and the relationship between the two groups and the Accused.[113] The Defence agrees with the Prosecution.[114]

6. I note that the Prosecution opposes most, if not all, of the facts on the ground that the relationship between the AFRC and the RUF and more specifically, SAJ Musa and senior members of the RUF, are central to the case. The Chamber must determine the right balance and assess whether those facts are central and, therefore, should not be judicially noticed but be determined on the evidence presented at trial.

7. However, a perusal of the Indictment, the Case Summary and the Prosecution Pre-Trial Brief indicate that the relationship between SAJ Musa and members of the RUF are not a central issue in this case. The facts geographically and temporally fall into a period that is not charged in the indictment, and therefore it can be said that the relationship between SAJ Musa and members of the RUF is not the main point that needs to be proven in this case, but is still important enough to bring a contextual understanding of the facts in this case. Therefore, the proposed facts are relevant, but are not sufficiently central to preclude the Chamber from exercising its discretion.

8. Therefore, I concur with the conclusions of the majority, with the exception hereunder, but would have added a brief reasoning for the exercise of the Trial Chamber's discretion.

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[112] See Majority Decision, para. 26.
[113] Response, paras 5, 7.
[114] Reply, para. 14.

B. Dissent on Fact 15

9. I have to dissent from the conclusion reached by my learned colleagues in relation to proposed Fact 15, specifically the last sentence[115].

10. In that regard it should be noted that this fact was taken from the section of the AFRC Trial Judgement entitled "Context". The Fact is only based on a conclusion made by the military expert Col. Iron in his expert report which was tendered by the Prosecution in the AFRC case.[116] Further, it should be recalled that in the AFRC case the Trial Chamber did not specifically address the involvement of the RUF in the Freetown attack, as the pleading of a joint criminal enterprise between members of these two factions was dismissed on the grounds of a defective pleading.[117]

11. Furthermore, unlike the other proposed facts the AFRC Trial Judgement, did not otherwise address the involvement of the RUF in the 1999 Freetown attack in detail.

12. Finally, I note that the prior Defence team agreed that the RUF was involved in the Freetown attack.[118] The current Defence team now appears to qualify this agreed fact and submits in its Reply that this fact does not tie it to any "grand conclusion".[119] I consider that this shows that the issue raised in Fact 15, i.e. the exact involvement of the RUF in the 1999 Freetown attack, is a central issue in this case.

13. For the above reasons, it is my considered opinion that it would have been preferable not to add a rebuttable presumption to specific issues raised in this sentence of proposed Fact 15, but to determine it on the evidence adduced in this case alone. For those reasons I would have not admitted proposed Fact 15.

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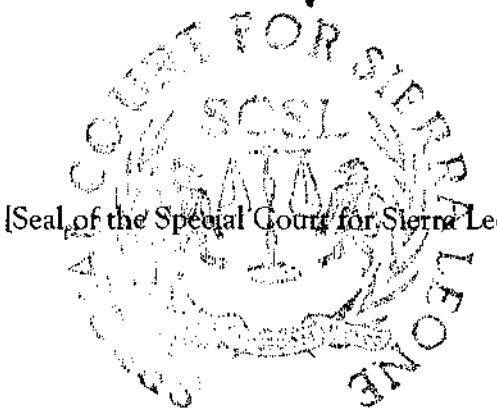
[115] The last sentence states "However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops"
[116] See AFRC Trial Judgement, para. 206, footnote 351.
[117] AFRC Trial Judgement, para. 85.
[118] SCSL-03-01-PT-277, Joint Filing by the Prosecution and Defence Admitted Facts and Law, 26 April 2007, Agreed Fact 31.
[119] Reply, para. 15.

Done at The Hague, The Netherlands, this 23rd day of Month 2009.

Doherty J.

Justice Teresa Doherty



[Seal of the Special Court for Sierra Leone]