987)

SCSL-03-01-T
(29163 - 29192)

29163

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 17 June 2010

PROSECUTOR

v.

Charles Ghankay TAYLOR

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

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

Counsel for the Accused:
Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

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

SEISED of the "Public with Annex A Defence Application for Judicial Notice of Adjudicated Facts from the RUF Trial Judgement Pursuant to Rule 94(B)", filed on 16 March 2010 ("Defence Motion");[1]

NOTING the "Public with Annex A Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the RUF Trial Judgement Pursuant to Rule 94(B)", filed on 26 March 2010 ("Prosecution Response");[2]

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Application for Judicial Notice of Adjudicated Facts from the RUF Trial Judgement Pursuant to Rule 94(B)", filed on 31 March 2010 ("Defence Reply");[3]

AND SEISED of the "Prosecution Motion (with Appendix A and B) for Judicial Notice of Adjudicated Facts from the RUF Judgement", filed on 31 March 2010 ("Prosecution Motion");[4]

NOTING the "Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts from the RUF Judgement", filed on 12 April 2010 ("Defence Response");[5]

NOTING ALSO the "Prosecution Reply to Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts from the RUF Judgement", filed on 16 April 2010 ("Prosecution Reply");[6]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 26*bis*, 73 and 94(B) 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:

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[1] SCSL-03-01-T-928.
[2] SCSL-03-01-T-930.
[3] SCSL-03-01-T-936.
[4] SCSL-03-01-T-935.
[5] SCSL-03-01-T-941.
[6] SCSL-03-01-T-942.

I. SUBMISSIONS

A. Defence Motion

1. The Defence requests that the Trial Chamber take judicial notice of 48 facts ("Defence Proposed Facts") adjudicated in the *Prosecutor v. Sesay, Kallon, Gbao* case[7] ("RUF Judgement").[8] It submits that the facts proposed are not contentious, do not involve legal conclusions and would both enable the Defence to streamline the evidence they would need to present during the Defence case and enable the Prosecution to streamline the evidence they would need to address in their closing brief.[9] It submits that judicial notice of these facts would promote judicial economy and harmonization of the judgements of this Court.[10]

2. The Defence argues that Rule 94(B) does not specify at which stage in the proceedings an application for judicial notice must be brought[11] and that the Prosecution would not be disadvantaged if judicial notice of the Defence Proposed Facts were taken at this time. It argues that the Prosecution may have already led evidence to challenge the rebuttable presumption that would be established by the admission of these facts or could challenge this presumption through cross-examination of Defence witnesses or by calling rebuttal evidence.[12]

3. The Defence submits that in accordance with the standards for admission of adjudicated facts set out in the jurisprudence,[13] the Defence Proposed Facts are (1) distinct, concrete and identifiable,[14] (2) relevant to the issues in the current case;[15] (3) not legal characterisations or conclusions;[16] and, (4) not taken out of context or altered on Appeal.[17] Finally, the Defence submits that in determining whether to exercise its discretion to take judicial notice of a proposed adjudicated fact, the Trial

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[7] Defence Motion, para. 1.
[8] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Judgement, 2 March 2009 ("RUF Judgement").
[9] Defence Motion, paras 2, 11.
[10] Defence Motion, paras 2, 8-9, 11.
[11] Defence Motion, para. 10.
[12] Defence Motion, paras 12-13.
[13] Defence Motion, para. 7 in reference to the jurisprudence accepted in *Prosecutor v. Taylor*, SCSL-03-01-T-765, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement Pursuant to Rule 94(B), 23 March 2009 ("Taylor Decision on AFRC Adjudicated Facts"), para. 30 and *Prosecutor v. Sesay, Kallon and 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.
[14] Defence Motion, para. 14.
[15] Defence Motion, para. 15.
[16] Defence Motion, para. 16.
[17] Defence Motion, para. 17.

Chamber must consider whether doing so would serve the interests of justice and ensure that the Accused is offered a fair trial.[18]

B. Prosecution Response

4. The Prosecution opposes the Defence Motion.[19] It argues that the exercise of the Trial Chamber's discretion 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. It argues that whereas it focused on the RUF accused in that trial, the facts in the Taylor case reflect a broader focus[20] and that while some issues were not central issues in the trial against the RUF accused, they are central to the charges against Mr. Taylor.[21]

5. Whilst the Prosecution argues that the Trial Chamber has a duty to prevent the wasting of time and resources on *undisputed facts*, the Defence Proposed Facts are not undisputed.[22] It submits that the jurisprudence supports the admission of adjudicated facts which do not "involve interpretation"[23] since such matters "...should be determined on the merits after the parties have had the opportunity to submit evidence and arguments."[24] While it accepts that that the Trial Chamber is "not restricted from taking judicial notice of facts which are not the subject of dispute between the parties",[25] it submits that the facts being put forward by the Defence which are not only disputed, but also relate to central issues in the case are not suitable for judicial notice.[26]

6. The Prosecution submits that judicial economy would not be advanced by granting the Motion. It argues that the Defence does not explain how taking judicial notice of these facts at this stage would ensure that the Trial, already at an advanced stage, would not be "unnecessarily long" nor does the Defence suggest which or how many witnesses it could drop as a consequence.[27] The fact that the Prosecution could call rebuttal evidence to challenge any rebuttable presumptions negates the Defence argument that taking judicial notice of these facts at this very late stage promotes judicial

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[18] Defence Motion, para. 18 referring to *Prosecutor v. Krajišnik*, ICTY-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 ("*Krajišnik* Decision of 28 February 2003"), paras 11-12.
[19] Prosecution Response, para. 2.
[20] Prosecution Response, para. 9.
[21] Prosecution Response, paras 10-11.
[22] Prosecution Response para. 12 referring to *Krajišnik* Decision of 28 February 2003, para. 11, which refers to "unnecessary disputes".
[23] Prosecution Response, para. 12 referring to *Prosecutor v. Sikirica et al*, IT-95-8, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000.
[24] Prosecution Response, para. 12 referring to *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts ("*Ntakirutimana* Decision"), 22 November 2001, para. 29.
[25] Prosecution Response para. 13 referring to Taylor Decision on AFRC Adjudicated Facts, para. 27.
[26] Prosecution Response, para. 13.
[27] Prosecution Response, para. 14.

economy.[28] The Prosecution argues that the jurisprudence emphasizes that the late filing of a motion for judicial notice of adjudicated facts is a significant factor in the exercise of the Trial Chamber's discretion against admission[29] and submits that it would be clearly disadvantaged by the late filing as it has already presented its entire case and cross-examined the Accused as well as other Defence witnesses.[30]

7. Finally, the Prosecution suggests that the volume of evidence already led in respect of the issues contained in the Defence Proposed Facts as well as the overlap between certain of these facts and those facts judicially noticed from the AFRC Judgement militates against taking judicial notice.[31]

C. Defence Reply

8. The Defence submits that the Prosecution objections are without merit and urges the Trial Chamber to admit all of the Defence Proposed Facts in order to promote judicial economy and the harmonization of judgements rendered by the Special Court.[32]

9. The Defence argues that the factual background between trials cannot change and that the Prosecution cannot now resile from the testimony of its witnesses from the RUF trial.[33] It argues that the Prosecution would not be unduly prejudiced by the admission of the Defence Proposed Facts, especially as they are largely based on the testimony of its own witnesses in the RUF case.[34]

10. With regard to the timing of its Motion, the Defence submits that it could not have filed it prior to the RUF Appeals Judgement of 26 October 2009 as some of the proposed facts were being considered by the Appeals Chamber. It submits that the Trial Chamber approved adjudicated facts from the AFRC Trial Judgement "essentially after the close of the Prosecution case" and suggests that the Prosecution characterisation of the proceedings as "advanced" with regard to Rule 94(B) is not supported by the jurisprudence.[35]

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[28] Prosecution Response, para. 15.
[29] Prosecution Response, para. 16, referring to Taylor Decision on AFRC Adjudicated Facts paras 35 and 36; *Ntakirutimana* Decision, para. 31; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005 ("*Hadžihasanović* Decision"), 14 April 2005.
[30] Prosecution Response, para. 17.
[31] Prosecution Response, para. 18.
[32] Defence Reply, paras 4, 6.
[33] Defence Reply, paras 7-11.
[34] Defence Reply, paras 4, 12.
[35] Defence Reply paras 13-17.

11. The Defence submits that the Prosecution's wide interpretation of what constitutes a "central issue" unduly restricts the Trial Chamber's discretion.[36] Finally, the Defence accepts certain reformulations to the wording of the Defence Proposed Facts sought by the Prosecution.[37]

D. Prosecution Motion

12. The Prosecution requests that the Trial Chamber take judicial notice of 38 adjudicated facts from the RUF Judgement set out in Appendix A to the Motion ("Prosecution Proposed Facts (Appendix A)"). It submits that these facts fulfil the legal criteria for judicial notice of adjudicated facts, do not go to central issues in the case and that taking judicial notice of these facts in this instance would serve the interests of justice.[38] It argues further that taking judicial notice of the facts in Appendix A would contribute to the harmonization of judgements, promote judicial economy and assist in streamlining pertinent issues for the final Judgement.[39]

13. The Prosecution sets out a further 12 adjudicated facts from the RUF Judgement in Appendix B to the Motion ("Prosecution Proposed Facts (Appendix B)"). It argues that these are facts that go to central issues of the case and should not be judicially noticed.[40] However, it argues that should the Trial Chamber take judicial notice of certain Defence Proposed Facts which in the Prosecution's view also go to issues central to the case, the Trial Chamber should take judicial notice of the facts in Appendix B to provide a more complete and balanced picture of the RUF findings.[41] It argues that the facts in Appendix B otherwise meet the criteria for judicial notice of adjudicated facts.[42]

14. The Prosecution submits that Rule 94(B) is not limited in its application to a specific stage of the proceedings and that it is not precluded from invoking the Rule after it has completed the presentation of the evidence in its case. It suggests that the current motion could not have been brought prior to the delivery of the RUF Appeals Judgement of 26 October 2009 and that the utility of seeking judicial notice could not properly be assessed until the conclusion of the testimony of the Accused and the commencement of the testimony of other Defence witnesses.[43]

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[36] Defence Reply, paras 4, 18-21.
[37] Defence Reply, paras 4-5.
[38] Prosecution Motion, paras 1-2, 9-14, 23.
[39] Prosecution Motion, para. 22.
[40] Prosecution Motion, paras 3, 24-25.
[41] Prosecution Motion, paras 3,26.
[42] Prosecution Motion, paras 15-20.
[43] Prosecution Motion, para. 21.

E. Defence Response

15. The Defence objects to the Prosecution Motion. It suggests the Motion was brought "in retaliation for, and to have a second chance at responding to the Defence Application" and is not in the interests of justice.[44] It argues that the Trial Chamber should not take judicial notice of any of the Prosecution Proposed Facts because doing so would violate the fair trial rights of the Accused and because the facts are either conclusory, misleading, cumulative or repetitive, or are not concrete, distinct and identifiable.[45]

16. The Defence incorporates by reference its legal submissions and arguments in its Motion and Reply.[46] Further, it submits that the safeguards of Rule 92*bis*(A) prohibiting the admission of information which goes to the acts and conduct of the accused should be incorporated into the Trial Chamber's analysis of the proposed adjudicated facts where the evidence is in relation to people and conduct that are proximate to the Accused.[47] It further submits that it would not be fair to the Accused to permit evidence of central issues to be admitted from another judgement without the opportunity of cross-examination.[48]

17. The Defence objects that it is not in the interests of justice for the Prosecution to put facts onto the record more than a year after its case has closed but that it is proper for the Defence to have filed its Application at this stage because the Defence is currently putting facts onto the record as part of its case.[49] The Defence suggests that taking judicial notice of the Prosecution Proposed Facts shifts the burden of the production of evidence from the Prosecution to the Defence and negatively impacts the Accused's procedural rights. Furthermore, the Defence argues that as it may have to call additional witnesses or conduct further investigations to test the "veracity of the claims" taking judicial notice of the Prosecution Proposed Facts would not advance judicial economy.[50]

18. The Defence argues that certain of the Prosecution Proposed Facts are too broad to be properly challenged or rebutted[51] and/or are central to issues in this case and, on this basis, objects to the entirety of Prosecution Appendix B and parts of Appendix A.[52] Finally, the Defence submits that

[44] Defence Response, paras 3-4.
[45] Defence Response, para. 5.
[46] Defence Response, para. 7.
[47] Defence Response, paras 8-12.
[48] Defence Response, para 11.
[49] Defence Response, para. 17.
[50] Defence Response, para. 18.
[51] Defence Response, para. 21.
[52] Defence Response, para. 22.

certain of the Prosecution Proposed Facts do not otherwise satisfy the criteria for judicial notice.[53] It sets out specific objections to these facts in Annex A to the Motion.[54]

F. Prosecution Reply

19. The Prosecution submits that the Defence suggestion that proposed facts ought not to be judicially noticed where they relate to people or conduct that are proximate to the Accused finds no support in the jurisprudence and that different considerations apply in relation to Rule 92*bis* and judicially noticed facts.[55] It submits, however, that should the Trial Chamber determine that the Defence suggestion is apposite, then it should apply equally to the facts proposed by the Defence.[56]

20. With regard to the timing of the application, the Prosecution notes that as the RUF Appeal Judgement was rendered some five months after the Prosecution case was formally closed it was patently impossible for the Prosecution to make an application during its case.[57]

21. The Prosecution submits that the Defence "threat" that it may have to call additional witnesses or conduct further investigations is without merit as 38 of the Prosecution Proposed Facts (Appendix A) relate largely to crime base evidence which the Defence had stated publicly that it is not disputing. The Prosecution submits that as the Defence have been on notice of the substance of the remaining 12 Prosecution Proposed Facts (Appendix B), which relate to AFRC/RUF relations in the lead up to and during the Freetown invasion, it cannot make a genuine claim to have been taken by surprise as these facts are simply additional to those on the same issues and from the same source that the Defence itself has requested the Trial Chamber to judicially notice and the substantial amount of evidence it has already introduced during cross-examination and through its own witnesses.[58]

22. The Prosecution submits that the Defence cannot argue that there is an extensive amount of evidence already on record in relation to the Prosecution Proposed Facts and at the same time argue that the Facts are "new evidence" which could require additional witnesses and investigations.[59] Finally, the Prosecution submits that the Defence arguments that proposed facts do not satisfy the criteria for judicial notice lack merit and that it is entitled to select those facts it wishes to request judicial notice of.[60]

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[53] Defence Response, paras 24-28.
[54] Defence Response, para. 6 and Annex A.
[55] Prosecution Reply, para. 3.
[56] Prosecution Reply, para. 3.
[57] Prosecution Reply, para. 4.
[58] Prosecution Reply, para. 5.
[59] Prosecution Reply, para. 7.
[60] Prosecution Reply, para. 8.

II. APPLICABLE LAW

23. Rule 94 provides as follows:

Judicial Notice

(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.

24. Rule 94(B) provides that the Chamber "may" decide to take judicial notice. Thus, unlike Rule 94(A), the power to take judicial notice of adjudicated facts pursuant to Rule 94(B) is a matter for the exercise of the Trial Chamber's discretion.

25. Rule 94(B) does not define what constitutes an "adjudicated fact." However, this Court has previously held that for an adjudicated fact to be judicially noticed at the discretion of a Trial Chamber, 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.[61]

26. 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.[62] In this regard, the doctrine of judicial notice serves two purposes:

[61] Taylor Decision on AFRC Adjudicated Facts, para. 26; Sesay Decision on Adjudicated Facts, para. 19.
[62] Taylor Decision on AFRC Adjudicated Facts, para. 28; Sesay Decision on Adjudicated Facts, para. 20.

judicial economy and consistency of case law. These purposes must be balanced against the fundamental right of an accused to a fair trial.[63]

27. In stressing the importance of judicial economy, the Special Court has held 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.[64]

III. DELIBERATIONS

28. There is no time bar to an application under Rule 94(B) since no time limit is prescribed by the Rule. Nevertheless, the Trial Chamber may take into account the stage of the trial at which a motion is brought in assessing whether granting it will promote judicial economy.[65]

29. In the present case, both parties filed their Motions at a late stage in the proceedings, that is, after the close of the Prosecution case, and after the Accused and several Defence witnesses had testified. The Trial Chamber notes, however, that the Appeals Judgement in the RUF Case was rendered on 26 October 2009, and that therefore the parties could not have filed their respective Motions prior to the commencement of the Defence case. Nonetheless, almost 5 months have passed between the issuance of the Appeals Judgement and the filing of the Motions.[66]

30. At the time the Defence Motion was filed, the Prosecution had already presented its entire case and had cross-examined the Accused as well as other Defence witnesses.[67] Consequently, in the view of the Trial Chamber this late filing has unfairly disadvantaged the Prosecution in its ability to challenge any adjudicated facts that might be judicially noticed. In all probability, the Prosecution

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[63] Taylor Decision on AFRC Adjudicated Facts, para. 28; Sesay Decision on Adjudicated Facts, para. 21: *Ntakirutimana Decision*, para 28.

[64] Taylor Decision on AFRC Adjudicated Facts, para. 29; Sesay Decision on Adjudicated Facts, para. 21.

[65] Sesay Decision on Adjudicated Facts, para. 28. *See also* Taylor Decision on AFRC Adjudicated Facts, para. 29, referring to Sesay Decision on Adjudicated Facts, para. 21; *Hadžihasanović* Decision, p. 3.

[66] In the *Hadžihasanović* Decision, the Trial Chamber took judicial notice of adjudicated facts despite the fact that the application filed after the conclusion of the case, on the basis that the Appeals of the cases from which these facts had been taken had only been issued after the completion of the case. However, in that case, the application was filed only a month after the final Appeal Judgement was issued. *Hadžihasanović* Decision, p. 4. Similarly, in the Sesay Decision on Adjudicated Facts, the application was made only a month after the issuance of the Appeal Judgement in the case of *Prosecutor v. Fofana and Kondewa*, SCSL-04-14, from which the facts had been taken. *See* Sesay Decision on Adjudicated Facts.

[67] Prosecution Response, para. 17.

would apply to call rebuttal evidence and, while a rebuttal case may only be presented with leave of the Trial Chamber,[68] trial fairness would compel the Trial Chamber to grant the Prosecution that opportunity.[69] Such a procedure would have the effect of prolonging the proceedings contrary to the judicial economy function of Rule 94(B).

31. With regard to the Prosecution Motion, the Trial Chamber is similarly of the view that the Defence is disadvantaged in its ability to rebut any adjudicated facts that might be judicially noticed at this stage of the trial since it has already cross-examined all of the Prosecution witnesses, and the Accused and a number of Defence witnesses have already completed their testimony. Moreover, in order to challenge any adjudicated facts which might be judicially noticed, it is probable that the Defence would need to call additional witnesses or conduct further investigations.[70] Again, this would be counterproductive in terms of promoting judicial economy.

32. Accordingly, the Trial Chamber is not convinced by either the Defence or the Prosecution that taking judicial notice of their proposed adjudicated facts would have any significant influence on judicial economy. Furthermore, the Trial Chamber finds that neither Motion serves the interests of justice in that, for the reasons given above, the responding party is placed at an unfair disadvantage. Thus, regardless of whether or not the proposed facts meet the criteria for an adjudicated fact to be judicially noticed,[71] the Trial Chamber finds that neither Motion is an appropriate case for the exercise of the Trial Chamber's discretion to take judicial notice pursuant to Rule 94(B).

FOR THE ABOVE REASONS, the Trial Chamber

DISMISSES both the Defence Motion and the Prosecution Motion.

Justice Sebutinde appends a separate and partially dissenting opinion.

Done at The Hague, The Netherlands, this 17th day of June 2010.

Justice Richard Lussick

Justice Julia Sebutinde
Presiding Judge

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

[68] Rule 85(A)(iii).
[69] See *Sesay* Decision, para. 33.
[70] See Defence Response, para. 18.
[71] See para. 25 *supra*.

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUSTICE JULIA SEBUTINDE

I. INTRODUCTION

1. I endorse the narration of the procedural background and applicable law by the Majority. I also endorse the Majority conclusion that the "Prosecution Motion (With Appendix A and B) for Judicial Notice of Adjudicated Facts from the RUF Judgement" (Prosecution Motion) should be dismissed. I do however adopt different reasons for dismissing the Prosecution Motion, as elaborated below. Furthermore, I respectfully disagree with the approach, reasoning and conclusions of the Majority with regard to the "Public with Annex A Defence Application for Judicial Notice of Adjudicated Facts from the RUF Judgement Pursuant to Rule 94(B)" (Defence Motion), in that I do not consider it to have been filed "at a late stage in the proceedings"[1], nor do I consider that it will " unfairly disadvantage the Prosecution in its ability to challenge any adjudicated facts that might be judicially noticed"[2]. Lastly, I do not agree that considerations of judicial economy should outweigh the rights of the Accused to a fair and expeditious trial as guaranteed under the SCSL Statute. In my opinion, the Defence Motion should not be summarily dismissed but rather should be determined on its merits in accordance with the legal criteria outlined in the "Applicable law".[3] My views with regard to both Motions are elaborated below in this Opinion.

II. THE PROSECUTION MOTION

2. The SCSL Rules of Procedure and Evidence allow for a variety of ways in which the parties may present evidence other than through oral testimony, including permitting parties to agree to facts under Rule 73bis (B) (ii) and (F), permitting parties to present documentary evidence including statements and transcripts under Rule 92bis and 92ter, permitting the admission of expert reports directly in evidence under Rule 94bis, and allowing a Trial Chamber to take judicial notice of facts of common knowledge and of adjudicated facts under Rule 94.

3. Furthermore, Rule 85 (A) of the Rules which governs the order or sequence in which evidence is to be presented at trial provides as follows:

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[1] Majority Decision, para. 29.
[2] *Ibid.*, para. 30.
[3] See part II of the Majority Decision.

> (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
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> (i) Evidence for the prosecution;
> (ii) Evidence for the defence;
> (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
> (iv) Evidence ordered by the Trial Chamber.

4. At this stage of the proceedings, the Prosecution and the Defence are not in the same legal position with respect to the presentation of evidence and consequently, their respective Motions ought not to be treated in the same manner. The Prosecution filed its Motion one year after formally closing its case-in-chief, and out of sequence contrary to Rule 85 (A),[4] whilst the Defence is still in the early stages of presenting its evidence. Consequently, an application by the Prosecution at this stage of the trial inviting the Trial Chamber to admit into evidence the facts listed in Appendix A or B to the Prosecution Motion, is tantamount to an attempt to re-open its case-in-chief, or alternatively, to call rebuttal evidence, procedures that should properly be pursued under Rule 85 (A) rather than Rule 94 (B). Consequently, the Prosecution Motion having been filed under Rule 94 (B) at this stage of the trial is, in my view, irregular.

5. Furthermore, it appears that the Prosecution Motion was largely, filed in reaction to and conditional upon the outcome of the Defence Motion rather than out of a genuine desire or need by the Prosecution to introduce fresh or additional evidence. In this regard, the Prosecution itself concedes that "*it has already brought evidence in relation to the proposed adjudicated facts*" listed in its Appendix A.[5] With regard to the rest of its proposed facts, the Prosecution submits:

> Appendix B lists facts under the theme of AFRC/RUF relations in the lead up to and during the Freetown invasion...The Prosecution views these facts as going to central issues in the case which have been extensively litigated and such category of adjudicated facts should not be judicially noticed. Should the Trial Chamber deny the Defence request that such facts should be judicially noticed, the facts in Appendix B should likewise, not be judicially noticed. However, should the Trial Chamber judicially notice this category of facts set out in the Defence application, the Prosecution seeks judicial notice of the facts listed in Appendix B in order to provide a more complete and balanced picture of the RUF findings than would otherwise be presented if judicial notice were taken only of the facts put forward by the Defence.[6]

6. In my view, the need to "*provide a more complete and balanced picture*" of the evidence adduced by the parties is not a criterion that is considered by the Trial Chamber in the exercise of its discretion under Rule 94 (B).[7] As the Defence rightly submits, the Prosecution has in any event,

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[4] The Prosecution formally closed its case on 27 February 2009 and subsequently filed its Motion a year later on 31 March 2010.
[5] Prosecution Motion, para. 22.
[6] Prosecution Motion, para. 3.
[7] See paras. 25-26 of Majority Decision.

called extensive evidence in relation to the facts listed in its Motion during its case-in-chief and would consequently, suffer no prejudice if the Prosecution Motion was denied.[8] I agree with the Defence submissions in this regard and for all the foregoing reasons I would summarily dismiss the Prosecution Motion.

III. THE DEFENCE MOTION

A) Timing of the Defence filing

7. As stated above, the Defence Motion cannot in my view, be characterised as having been filed "at a late stage in the proceedings." This is because it was filed at an early stage in the Defence case and the bulk of the Defence witnesses are yet to testify. Unlike the Prosecution Motion that was filed a year after the close of the Prosecution case and out of sequence, the Defence Motion was filed after only four Defence witnesses[9] out of a total of 166 Defence witnesses,[10] had testified. In this case, the failure to take into account this important temporal distinction by putting the Defence Motion on the same footing as the Prosecution Motion, would in my view, not only be erroneous but would violate the fair trial rights of the Accused under Article 17 of the Statute. In this regard it is important to distinguish the timing of the Defence Motion from that of the Sesay Defence motion referred to in the "Decision on Sesay Defence Application for Judicial Notice to be Taken of Adjudicated Facts Under Rule 94(B)"[11] where the Sesay Defence having closed its case on 13 March 2008, filed its motion two months later on 23 May 2008. In that case Trial Chamber I in dismissing the Sesay Defence motion observed:

> The First Accused closed his case roughly two months prior to bringing this Application...At this stage of proceedings, when the parties have presented virtually all of their evidence, including evidence relating directly to the issues addressed by the proposed adjudicated facts, the Chamber opines strongly that creating a rebuttable presumption in favour of certain proposed adjudicated facts will serve only to complicate the evidentiary record, will not promote judicial economy and would not be in the interests of justice."[12]

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[8] Defence Response, para. 20.

[9] Although the Defence Motion was filed on 16 March 2010, five months after the RUF Appeals Judgement was delivered, by 15 March 2010 only the Accused and Witnesses DCT-179, DCT-125 and DCT-068 had testified.

[10] The Defence has indicated in its latest " Public with Annex A, C and Confidential Annex B Defence Rule 73ter Filing of Witness Summaries – Version Five", SCSL-03-01-T-957 that it has a total of 162 *viva voce* witnesses, 3 Rule 92quater witnesses and one Rule 92bis witness, of whom 35 are considered 'core witnesses' .

[11] *Prosecutor v. Sesay, Kallon and 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.

[12] Ibid. para. 35.

8. The Defence is therefore within its rights under Article 17 to present its evidence in the form of adjudicated facts pursuant to Rule 94 (B) at this time. My views with regard to the timing of the Defence Motion is consistent with the Trial Chamber's earlier holding in this trial that:

> The timing of the Motion is not in itself of sufficient concern to justify dismissal of the Motion in its entirety....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 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.[13]

B) Alleged disadvantage to the Prosecution

9. I disagree with the Majority view that the Defence filing "unfairly disadvantages the Prosecution in its ability to challenge any adjudicated facts that might be judicially noticed."[14] To carry this view to its logical conclusion, it could be argued that any evidence adduced by the Defence after the Prosecution has closed its case should be excluded solely on the ground that it would "unfairly disadvantage the Prosecution in its ability to challenge the Defence evidence". Such a position would be untenable and contrary to the fair trial rights of the Accused. Furthermore, it is not true in this case that the Prosecution would thereby "not be able to challenge or rebut the adjudicated facts". In my view, the Prosecution has ample opportunity to challenge or rebut the adjudicated facts proposed by the Defence in a number of ways, namely, *(1)* by using Prosecution evidence already on the record; *(2)* through cross-examination of Defence witnesses, the bulk of whom have not yet testified; *(3)* by applying to re-open its case or to call evidence in rebuttal under Rule 85 (A); and *(4)* having taken part in the RUF trial, the Prosecution had every opportunity to take arguments in relation to the factual conclusions reached in the RUF trial and to challenge the proposed facts during that trial. This is because in the Special Court, the Office of the Prosecutor is in the privileged position of operating as a coherent whole in the prosecution of the various accused persons, unlike the various Defence teams which do not have this benefit. I therefore do not agree that the only option open to the Prosecution to challenge the proposed adjudicated facts would be that which would necessarily prolong the proceedings.[15]

10. Furthermore, I find the Prosecution arguments regarding its alleged prejudice inherently contradictory. On the one hand, the Prosecution argues that "if the Defence application were to be granted at this late stage, the effect would be that the Prosecution presented its entire case and cross-

[13] *Prosecutor v. Taylor*, SCSL-03-01-T-765, Decision on Defence Application for Judicial Notice of Adjudicated Facts From the AFRC Trial Judgement Pursuant to Rule 94 (B), 23 March 2009.
[14] Majority Decision, para. 30.
[15] See Majority Decision, para. 30.

examined the Accused as well as a number of other Defence witnesses without the knowledge of its burden to overcome a rebuttable presumption as to the veracity of certain now judicially noticed facts."[16] This argument presupposes that the Prosecution is somehow taken by surprise by the facts sought by the Defence to be judicially noticed. On the other hand, the Prosecution describes these same proposed facts as a "duplication" or "cumulative overlap" of already existing evidence in the form of either "facts judicially noticed from the AFRC Judgement"[17] or "extensive Prosecution evidence already on the record."[18] This latter argument presumes that the Prosecution is in fact not surprised as there is nothing new in the proposed facts. These two arguments are, in my view, contradictory, irreconcilable and consequently unconvincing.

C) **Balancing judicial economy with the fair trial rights of the Accused, under Rule 94 (B):**

11. Lastly, I disagree with the notion that entertaining the Defence Motion on its merits at this stage of the proceedings "would not promote judicial economy." In my view, the Trial Chamber in exercising its discretion under Rule 94 (B), should never sacrifice the fair trial rights of the Accused guaranteed under Article 17 of the Statute[19] at the alter of judicial economy. As Justice Geoffrey Robertson aptly observes in his Separate Opinion on appeal:

> The purpose of judicial notice in the law of evidence is often said to be expedition, from which it has been assumed that the court, in deciding whether to apply Rule 94(A), must reach what is described as "the balance between judicial economy and the right of the accused to a fair trial". In my view, expedition and judicial economy do not accurately reflect the real purpose of this Rule and the "balance" sets up a false dichotomy between the assumed purpose of economy and the rights of the defendant....[20]

In my view these observations although targeted at the provisions of Rule 94 (A), equally apply to the exercise of the Trial Chamber's discretion under Rule 94 (B). I am of the view that in the present case, the right of the Accused to a fair trial, in particular his right to adduce evidence in his defence pursuant to Rule 94 (B) far outweighs any considerations of judicial economy at this stage.

12. In view of the foregoing, I am of the opinion that it would be in the interests of justice to determine the Defence Motion on its merits and to consider the facts proposed by the Defence on a case-by-case basis in light of the criteria outlined in the Applicable Law. This analysis is conducted below.

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[16] Prosecution Response, para. 17.
[17] Prosecution Response, para. 18.
[18] Prosecution Response, para. 19.
[19] Including the right to have adequate time and facilities for the preparation of his defence.
[20] *Prosecutor v. Norman et al*, SCSL-04-14-AR73-398, Fofana - Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 16 May 2005, Separate Opinion of Justice Robertson, para.15.

IV. MERITS OF THE DEFENCE MOTION

A) Defence Proposed Facts to which the Prosecution does not object:

13. The Prosecution does not object to Defence Proposed **Facts 2 and 5** which relate to RUF ideology; to **Fact 8** which details Bockarie's taking *de facto* leadership of the RUF following Sankoh's arrest in February, 1997; **Fact 14** which relates to the general structure of the Supreme Council during the Junta period; and **Fact 22** which details SAJ Musa's establishment of a base in Koinadugu District period to the joint attack on Kono District.[21] I find that these facts meet the criteria set out in the Applicable Law and would take judicial notice of them pursuant to Rule 94(B).

14. The Prosecution does not object to Defence Proposed **Facts 12 and 13** which detail events relating to the May 1997 coup d'état or to **Fact 17** which describes the ECOMOG intervention of February, 1998, provided that the exact and full language of the RUF Judgement is adopted rather than the limited version suggested by the Defence.[22] The Defence does not object to retaining the original formulations in Facts 12 and 13.[23] It does not object to the inclusion of original text in Fact 17, namely, "Kabbah's Government was restored to power in March 1998" but asserts that this sentence was itself the subject of judicial notice in the RUF trial and therefore is not appropriate as an adjudicated fact.[24] I note that the sentence at issue was in fact admitted by the RUF Trial Chamber under Rule 94(A) as a "fact of common knowledge".[25] Unlike a fact judicially noticed under Rule 94(B) which is rebuttable at trial, a fact of common knowledge under Rule 94(A) is beyond contention and cannot be contested during the proceedings. In the present case however, since both parties seem to have no problem with judicial notice of the full text of Fact 17, I find that the fact can be judicially noticed as requested.

15. I find that Defence Proposed Facts 12, 13, and 17 in their exact and full original form meet the criteria set out in the Applicable Law and that it is in the interests of justice to take judicial notice of them pursuant to Rule 94(B).

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[21] Prosecution Response, Annex A.
[22] Prosecution Response, Annex A.
[23] Defence Reply, Annex A.
[24] Defence Reply, Annex A.
[25] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 24 June 2004, para. 45, Fact V; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-392, Consequential Order Regarding Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 24 May 2005, Annex A, Fact V.

16. Finally, the Prosecution states that it does not object to Defence Proposed **Facts 33 and 34**[26] but also submits that a volume of evidence has already been led in respect of these facts as they overlap with Fact 11 judicially noticed from the AFRC Trial Judgement.[27] I find that although these Defence Proposed Facts deal with similar subject matters as AFRC Adjudicated Fact 11, they contain separate and distinct elements and should not be eliminated from consideration for judicial notice on this ground alone. I find that these facts meet the criteria set out in the Applicable Law and would take judicial notice of them pursuant to Rule 94(B).

B) Defence Proposed Facts contested by the Prosecution:

17. I now turn to the Defence Proposed Facts that are objected to by the Prosecution.

(i) Facts in respect of which the Prosecution submits a large volume of evidence has been adduced:

18. The Prosecution objects to Defence Proposed Facts 18, 21, 23, 33, 34, 35, 41 and 42 on the grounds that a volume of evidence has already been led in respect of these facts and in addition that they overlap with adjudicated facts already admitted from the AFRC case. The Prosecution concludes that taking judicial notice of those facts would neither serve the interests of justice nor would it enhance judicial economy.[28]

19. The Prosecution submits that Fact 18, which deals with the retreat of the AFRC and RUF from Freetown, overlaps with AFRC Adjudicated Fact 5;[29] that Fact 21, which deals with the split between SAJ Musa and the RUF, overlaps with AFRC Adjudicated Fact 6;[30] that Fact 23, which deals with Johnny Paul Koroma's removal from power, overlaps with AFRC Adjudicated Fact 7;[31] that Facts 33 and 34, which deal with the arrival of SAJ Musa at Major Eddie Town and events leading up to the subsequent attack on Freetown, overlap with AFRC Adjudicated Fact 11;[32] that Fact 35, which deals with Bockarie's claim that the RUF were approaching Freetown, overlaps with AFRC Adjudicated Fact 12;[33] and that Facts 41 and 42, which deal with the withdrawal from Freetown after the 6 January 1999 invasion, overlap with AFRC Adjudicated Fact 15.[34] I find that although these Proposed Facts deal with similar subject matters as adjudicated facts judicially noticed from the AFRC case, the Proposed Facts contain separate and distinct elements not covered in the AFRC

[26] Prosecution Response, Annex A.
[27] Prosecution Response, para. 18.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

adjudicated facts and consequently, objections based on this ground alone would not be a bar to their judicial notice.

(ii) Facts which the Prosecution submits are central to the case:

20. The Prosecution objects to judicial notice of Defence Proposed Facts 1, 3, 4, 6, 7, 9-11, 15, 16, 18-21, 23-32, and 35-47 on the grounds that these facts either in part or in whole go to central issues in the case.[35]

21. International Tribunals have held that while facts which relate indirectly to the criminal responsibility of the Accused may be the proper subject of judicial notice under Rule 94(B), a Trial Chamber must exercise caution in taking judicial notice of facts which are *central* to the criminal responsibility of the Accused.[36] Indeed, judicial notice should not be taken of adjudicated facts which relate to the acts, conduct and mental state of the Accused.[37] This restriction does not, however, extend to "the acts, conduct and mental state of persons whose conduct the Accused is alleged to be responsible for such as alleged subordinates, participants in a joint criminal enterprise or persons whom the accused is alleged to have aided and abetted".[38] I will now apply this criterion to the various groups of proposed facts.

Facts relating to matters of RUF ideology:

22. Defence Proposed **Facts 1, 3 and 4** relate to RUF ideology. The Prosecution objects that all or part of these facts go to central issues in the case.[39] Fact 1 relates to the RUF agenda and its dissemination within the ranks; Fact 2 relates to the acceptability within RUF political ideology of taking up arms to further revolutionary goals; and Fact 4 relates military ideology which governed the conduct of military operations, including the behaviour of fighters towards civilians. I find that Defence Proposed Facts 1, 3 and 4 do not relate to the acts, conduct or mental state of the Accused, are not critical and, therefore, are not central issues in the case.

23. The Prosecution also objects that the Defence have failed to include a sentence in **Fact 4** which appeared in the original RUF Judgement, namely, "The Chamber has considered the military ideology in further detail in its findings on the disciplinary system within the RUF". The Defence

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[35] Prosecution Response, para. 11 and Annex A

[36] *Prosecutor v. Karemera et al.*, ICTR-98-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, paras 48, 50.

[37] *Ibid.*, para. 50.

[38] *Ibid.*, para. 51.

[39] Prosecution Response, para. 11 and Annex A.

does not object to inclusion of this sentence, but notes that it is not a factual finding.[40] I consider this sentence is not a distinct, concrete and identifiable fact and should not form part of the text of Defence Proposed Fact 4.

Facts relating to matters of RUF operational command structure:

24. Defence Proposed **Facts 6 and 7** relate to the RUF operational command structure. The Prosecution objects that the final paragraph of Fact 6, which relates to the composition of the RUF High Command at the time of the March 1991 invasion, goes to central issues in the case but does not object to the substance of the remainder of the fact. I find that although this part of Fact 6 cites Foday Sankoh, an alleged associate and subordinate of the Accused, as a member of the RUF High Command, it does not go to issues central to this case. Rather, it deals with a well-known RUF structure as it stood over 5 years before the start of the Indictment period and adds non-crucial elements to evidence already adduced by the Prosecution.

25. The Prosecution also argues that the first paragraph of Proposed Fact 6 contains Defence additions that are not in the facts found by Trial Chamber I. I find that the text in this paragraph presented by the Defence is identical to paragraph 657 of the RUF Judgement and that no adjustment of the text is necessary.

26. The Prosecution objects that Defence Proposed Fact 7, which states that "Foday Sankoh was the *de jure* and *de facto* leader of the RUF from 1991 until his arrest in 1997", goes to issues central to the case. I consider that this fact suggests a final conclusion in relation to the overall control of the RUF within the Indictment period. This description of Sankoh as the "*de jure* and *de facto*" leader of the RUF is interrelated with the Accused's own alleged criminal responsibility especially with regard to the Accused's alleged influence over the RUF. I find accordingly that Proposed Fact 7 goes to central issues in the case and that it would not qualify for judicial notice under Rule 94 (B).

Facts related to the RUF from November 1996-May 1997 and to Foday Sankoh:

27. Defence Proposed **Facts 9, 10 and 11** relate to the RUF from November 1996-May 1997 as well as the role and powers of Foday Sankoh. The Prosecution objects that all of Proposed Facts 10 and 11 as well as the phrase "Bockarie [...] put himself in control of the movement" in Proposed Fact 9 go to central issues in the case. The Prosecution argues specifically that Proposed Facts 10 and 11 highlight the role and powers of Foday Sankoh as leader of the RUF and that central issues in this

[40] Defence Reply, Annex A.

case concern the Accused's influence over Sankoh and other RUF leaders and the Accused's role in ordering, approving or encouraging promotions within the RUF.[41]

28. I find that Proposed Fact 9 makes a statement about the overall control of the RUF and for the same reasons set out in relation to Proposed Fact 7, above find that it is not suitable for judicial notice.[42]

29. Proposed Facts 10 and 11 relate to promotions made by Foday Sankoh while detained in Nigeria. I consider that these facts relate to the command structure of the RUF and to the roles and powers of Foday Sankoh, an alleged subordinate and associate of the Accused. It is established in the jurisprudence that a Trial Chamber may take judicial notice of the acts, conduct and mental state of persons whose conduct the Accused is alleged to be responsible for such as alleged subordinates, participants in a joint criminal enterprise or persons whom the Accused is alleged to have aided and abetted.[43] I find that Facts 10 and 11 do not relate to the Accused's alleged influence or position in relation to Sankoh nor the Accused's alleged role in approving or encouraging promotions. Rather, the Facts deal only with the actions of Sankoh within the RUF command structure. Further, the Facts do not make conclusions about the overall control of the movement. I find accordingly that these Facts do not go to the alleged responsibility of the Accused and are not central to the case.

Facts relating to the RUF during the Junta Government, May 1997 to February 1998:

30. Defence Proposed **Fact 15** describes the lack of integration of the RUF and AFRC forces within the military command of the Junta military structure and **Fact 16** concerns misunderstandings and conflicts between the RUF and AFRC as a result of this lack of a unitary command structure and Bockarie's disillusionment with the RUF role in the AFRC government. The Prosecution does not object to the first sentence of Fact 15. It objects that the remainder of Fact 15, which deals with a proposal by Bockarie to integrate the armed forces of the AFRC and the RUF, and all of Fact 16 go to central issues in the case as they relate to that the relationship between the AFRC and the RUF.[44]

31. I recall the Trial Chamber's finding in its *Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement Pursuant to Rule 94(B)*, that facts which relate to the relationship between the AFRC and the RUF but not to the relationship of these two organisations to the Accused may be judicially noticed under Rule 94(B).[45] I find that Facts 15 and 16 deal with the

[41] Prosecution Response, para. 11.
[42] Supra, para. 26.
[43] *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. 51.
[44] Prosecution Response, para. 10 and Annex A.
[45] Taylor Decision on AFRC Adjudicated Facts, paras 41, 54.

relationship between the AFRC and the RUF and the powers of Sam Bockarie, an alleged subordinate and associate of the Accused. These Facts relate neither to the Accused's relationship with the AFRC and RUF nor to his alleged influence over Sam Bockarie. I therefore find that these Facts are not so crucial to the charges against the Accused as to be considered central in this case.

Facts relating to events following the Intervention, February 1998:

32. Defence Proposed **Facts 18 to 21** and **23 to 26** relate to the withdrawal from Freetown following the Intervention in February 1998 and subsequent events.

33. The Prosecution objects that the first sentence of **Fact 18**, namely, "The withdrawal of RUF and AFRC troops from Freetown was unplanned and chaotic" goes to central issues and that judicial notice should not be taken of it. I find this sentence is very similar in content to a sentence in Fact 5 previously judicially noticed from the AFRC Trial Judgement[46] and does not go to an issue central to the case. The Prosecution does not object to the remainder of Fact 18.

34. The Prosecution objects that Facts 19 to 21 and Fact 23 go to central issues in this case. **Facts 19 and 20** relate to the movement and regrouping of AFRC and RUF troops in Masiaka and Makeni immediately following the Intervention; **Fact 21** relates to SAJ Musa's break from the AFRC/RUF; and **Fact 23** concerns Bockarie's expelling of Johnny Paul Koroma to Kangama. **Fact 24** relates to Bockarie's promotion of Sesay, Superman and Kallon. The Prosecution also argues that this fact goes to a central issue in the case, namely Bockarie's role in issuing promotions.[47]

35. I find that whilst Facts 19 to 21 and Facts 23 to 24 relate to the structure of the AFRC and RUF and to the relationship between these groups, they do not relate to the allegations against the Accused vis-à-vis these two organisations or his alleged influence over Sam Bockarie. For the same reasons as set out in relation to Facts 15/16[48] and Facts 10/11[49] above, I find that these Facts are not so crucial to the charges against the Accused as to be considered central in this case. I note further that as similar, but not identical, information to that contained in Fact 21 and Fact 23 has already been judicially noticed in Fact 6 and Fact 7 from the AFRC Trial Judgement respectively, there is no prejudice to the Prosecution.[50]

36. **Fact 25** relates to the "fractious" relationship between the AFRC and RUF in Kono District in April, 1998. The Prosecution argues that this fact concerns a rift between the AFRC and RUF

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[46] Taylor Decision on AFRC Adjudicated Facts, Annex A, Fact 5 which reads in part: "The retreat from Freetown was uncoordinated and without any semblance of military discipline."
[47] Prosecution Response, para. 11.
[48] Supra, para. 31.
[49] Supra, para. 29.
[50] Taylor Decision on AFRC Adjudicated Facts, Annex A, Fact 7.

which was found to have spelled the end of the joint criminal enterprise and therefore clearly relates to a central issue which must be determined on the basis of evidence in the present case.[51]

37. I find that Fact 25 deals with the relationship between the RUF and AFRC and does not relate to the Accused's own participation in the alleged joint criminal enterprise. I am satisfied that this fact does not relate to the Accused's relationship to the RUF or the AFRC and find that Fact 25 is not crucial to the charges against the Accused so as to be considered central to the case.

38. **Fact 26** relates to the failed Fiti-Fata mission in August 1998 and Superman's joining with SAJ Musa following animosity with Bockarie. The Prosecution argues that as Fact 26 concerns the Fiti-Fata mission, it relates to a key issue. It argues that the factual circumstances and timing have emerged differently in the evidence in this case, including as to the relationship between Superman and Bockarie.[52] I find that the Fiti-Fata mission and the subsequent discord between Bockarie and Superman are not central issues in this case and also note that, as with all judicially noticed adjudicated facts under Rule 94 (B), it is open to the Prosecution to challenge the truth of Proposed Fact 26 on the basis that the evidence in this regard is contradictory.

Facts relating to Bombali and Koinadugu Districts: April to November 1998

39. Defence Proposed Facts 27-32 and Fact 35 all generally relate to events in Bombali and Koinadugu Districts from April to November 1998. The Prosecution objects to all or parts of these proposed facts on the grounds that they go to central issues in this case.[53]

40. Defence Proposed **Facts 27 and 29** concern the movement of Gullit and AFRC/RUF troops under his command from Kono to Koinadugu and Bombali Districts in late April 1998. The Defence agrees to retain the omitted words highlighted by the Prosecution from paragraphs 848 and 850 of the RUF Judgement at the end of the second and third paragraphs of Defence Proposed Fact 29.[54] The Prosecution additionally objects to the insertion of the words "to Rosos" in the first paragraph of Defence Proposed Fact 29. I find that this language provides clarity and does not misrepresent the findings of the RUF Judgement.

41. The Prosecution objects that all of Fact 27 and the first sentence of Fact 29, which states in relevant part that during the march to Rosos the AFRC was unable to transmit or monitor radio signals, relate to a central issue in the case.[55] I find that although these facts touch upon the relationship between the AFRC and RUF, they do not relate directly to the allegations against the

[51] Prosecution Response, para. 11.
[52] Prosecution Response, para. 11.
[53] Prosecution Response, Annex A.
[54] Prosecution Response, Annex A; Defence Reply, Annex A.
[55] Prosecution Response, Annex A.

Accused vis-à-vis these two organisations and for the same reasons set out in relation to Facts 15 and 16 above,[56] are not so crucial to the charges against the Accused as to be considered central issues in this case. The Prosecution does not object to the remainder of Fact 29.

42. Defence Proposed **Fact 28** states that following the AFRC's departure from Kono, they no longer received arms and ammunition from Kailahun and, instead, were "self-reliant" and depended upon supplies captured from their enemies. The Prosecution objects to these facts on the grounds that they relate in whole or in part to a central issue in the case.[57] I find this fact relates to the factual military circumstances of the AFRC and does not directly relate to the Accused's alleged relationship with the AFRC nor his own alleged acts and conduct. I therefore find that Fact 28 is not so crucial to the charges against the Accused as to be considered central in this case.

43. The Prosecution argues that all of **Fact 30** and the first sentence of **Fact 31** relate to continued cooperation between the forces from May to November 1998 and are central to the charges against the Accused.[58] The Prosecution argues with regard to Fact 30, that the factual circumstances and timing have emerged differently in the evidence in this case.[59] I note that, as with all judicially noticed adjudicated facts, which are subject to a rebuttable presumption of truth, it is open to the Prosecution to challenge the truth of Proposed Fact 30 on the basis that the evidence has emerged differently in this case.

44. I find that Fact 30 and all of Fact 31 relate to the relationship and structure of the AFRC and RUF but do not relate directly to the allegations against the Accused vis-à-vis these two organisations. For the same reasons set out in relation to Facts 15 and 16 above,[60] I find that the Facts are not so crucial to the charges against the Accused as to be considered central issues in this case.

45. **Fact 32** states in relevant part that Superman and the RUF forces in Koinadugu were an independent RUF faction and were not under the "effective control of or working in concert with" the RUF High Command. The Prosecution objects that all of Fact 32 goes to central issues in the case and that its final sentence contains a legal conclusion. The Defence replies that it is not a legal conclusion, but rather a factual finding which has legal implications.[61] I find for the purposes of Rule 94(B) there is, practically speaking, no distinction between a legal finding and a factual finding which has legal implications and consequently find that the final sentence of Fact 32 is not suitable for

[56] Supra, para. 31.
[57] Prosecution Response, Annex A.
[58] Prosecution Response, para. 11.
[59] Prosecution Response, para. 11.
[60] Supra, para. 31.
[61] Defence Reply, Annex A.

judicial notice. The remainder of Fact 32 relates to fractionalisation within the RUF structure and is not crucial to the charges against the Accused so as to be considered a central issue in this case.

46. **Fact 35** concerns Sam Bockarie's frustration with the independent operation of the AFRC and his claim over the BBC that troops under his command were marching on Freetown as well as SAJ Musa's instructions to an RUF radio operator, Alfred Brown, not to disclose AFRC operations to the RUF. The Prosecution objects that the whole of this fact relates to a central issue in the case.[62] The Defence submits that this evidence is not otherwise readily available to it since the death of DCT-024.[63]

47. I find that Fact 35 relates to the relationship of the AFRC and RUF but not directly to the allegations against the Accused vis-à-vis these two organisations. For the same reasons set out in relation to Facts 15 and 16, above,[64] I find that the fact is not crucial to the charges against the Accused so as to be considered central issues in this case. I also note that similar, but not identical, evidence as that contained in Fact 35 has already been judicially noticed in AFRC Adjudicated Fact 12, there is no prejudice to the Prosecution.

Facts relating to the Attack on Freetown: December 1998 to January 1999

48. Defence Proposed Facts 36 to 42 relate to the planning and execution of the attack on Freetown on 6 January 1999. The Prosecution objects to judicial notice of these proposed facts on the grounds that they go to issues central to this case.[65]

49. **Fact 36** concerns Sesay's return to Buedu by December 1998 and a strategic meeting convened by Bockarie. The Prosecution objects to the first sentence of Fact 36 on the grounds that the timing of Sesay's return goes to central issues in the case.[66] I find that Facts 36 relates to RUF structure. It does not relate to the acts, conduct or mental state of the Accused, is not critical and for the same reasons set out in relation to Facts 10 and 11 above,[67] is not central to the case. I also note that, as with all judicially noticed adjudicated facts, which are subject to a rebuttable presumption of truth, it is open to the Prosecution to challenge the truth of Proposed Fact 36 on the basis that the evidence has emerged differently in this case.

50. **Fact 37** concerns Gullit's command over the AFRC following the death of SAJ Musa and subsequent request to Bockarie for reinforcements. The Prosecution objects to the language added by

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[62] Prosecution Response, Annex A.
[63] Defence Reply, Annex A.
[64] Supra, para. 31.
[65] Prosecution Response, Annex A
[66] Prosecution Response, Annex A.
[67] Supra, para. 29.

the Defence to the first paragraph of Fact 37. I find this language adds clarity whilst not misrepresenting the RUF Trial Judgement's findings. It should therefore be retained.

51. The Prosecution also objects that the last sentence of Fact 37, which states that Bockarie suspected the call from Gullit for reinforcements for the attack on Freetown was a "ruse", goes to central issues in the case. I note that Fact 37 relates to the same events as Facts 13 and 14 judicially noticed from the AFRC Trial Judgement but that the element relating to communication between Bockarie and Gullit regarding reinforcements is novel.[68] I find that this sentence suggests a conclusion about the nature of Sam Bockarie's intentions vis-à-vis the AFRC and suggests a finding about the nature of the coordination and planning of the Freetown attack. It is therefore more contentious and critical than the other facts which concern the relationship between the AFRC and RUF or which set out general factual events. I find that this Fact does not qualify for judicial notice as it goes to central issues in the case.

52. **Fact 38** concerns communications between Gullit and Bockarie about reinforcements for the Freetown invasion. The Prosecution objects that the first paragraph of Fact 38, which deals with a communication from Gullit to Bockarie on 5 January 1999, goes to central issues in the case because of the timing of the communication is disputed. The Prosecution also objects to a sentence in the first paragraph, which states, "Bockarie told Gullit that his plan to attack Freetown was foolish", goes to central issues in the case. I find that the first paragraph of Fact 38 is interrelated with the Accused's alleged criminal responsibility as it goes to the mental state and intentions of an alleged subordinate/associate of the Accused vis-à-vis a central issue in the case, namely the alleged plan or coordination of the attack on Freetown. For the same reasons set out in relation to Fact 37, above,[69] I would not take judicial notice of this paragraph. The Prosecution does not object to the final paragraph of Fact 38.[70]

53. **Fact 39** states that the AFRC forces entered Freetown on 6 January 1999 and describes the subsequent actions of the AFRC troops. The Prosecution objects that to the extent that these facts limit those who entered Freetown to the AFRC, the fact goes to central issues and should not be judicially noticed. I find that Fact 39 does not in and of itself make a conclusion which limits those who entered Freetown to solely the AFRC. Rather, it describes the movement of the AFRC troops under Gullit during the invasion. It remains open to the Prosecution to challenge the truth of Proposed Fact 39 on the basis that the evidence has emerged differently in this case. Further, I note

[68] Decision on AFRC Adjudicated Facts, Annex A.
[69] Supra, para. 51.
[70] Prosecution Response, Annex A.

that Fact 39 is similar in nature to Fact 15 judicially noticed by Majority from the AFRC Trial Judgement.[71] I find that it not central to the case.

54. **Fact 40** states: "The RUF had no control over the AFRC forces in Freetown during the attack and the RUF did not form part of a common operation with the AFRC forces for this attack on 6 January 1999." The Prosecution objects that this fact both goes to central issues in the case and is a legal conclusion. It also argues that Fact 40 "simply states a different Trial Chamber's conclusion on the basis of the evidence before it".[72] The Defence replies that this is a factual finding which has legal implications, but is not a legal conclusion, in and of itself. I find little practical distinction in the Defence's submission. I find that through its reference to "control" and alleged "common operation" of the RUF and AFRC forces Fact 40 makes direct legal conclusions about modes of liability under which the Accused is charged, and therefore, is not suitable for judicial notice under Rule 94(B).

55. **Fact 41** concerns AFRC attempts to advance into the western part of Freetown on 6 and 7 January 1999 and a request by Gullit to Bockarie for reinforcements on 9 January 1999. The Prosecution objects that the whole of this fact goes to issues central to the case. I note the reference to Bockarie's "promise" to Gullit to send reinforcements to meet the AFRC fighters at Wellington in the second paragraph of Fact 41 and find that this paragraph deals with the intentions of an alleged subordinate/associate of the Accused vis-à-vis a central issue in the case, namely the alleged plan or coordination of the attack on Freetown. I refer to the findings in relation to Fact 37, above,[73] and find that this fact is not suitable for judicial notice for the same reasons.

56. The Prosecution objects that the Defence inaccurately sets out the findings of Trial Chamber I in Defence Proposed **Fact 42** as the Defence cites first a portion of paragraph 892 and then a portion of paragraph 888 of the RUF Judgement.[74] I find that the selection and re-arrangement of the order of the texts does not re-formulate the findings of the RUF Judgement in such a manner as to make Defence Proposed Fact 42 substantially different or misleading. The Prosecution also objects that the final sentence of Fact 42 which states, "The AFRC and RUF met in Waterloo about three weeks after the AFRC had first entered Freetown", goes to central issues in the case. I refer to the findings in relation to the final paragraph of Fact 41 and find that it would cause no prejudice to the Prosecution to take judicial notice of Fact 42 for the same reasons.

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[71] Decision on AFRC Adjudicated Facts, Annex A., Judge Doherty dissenting.
[72] Prosecution Response, para. 11.
[73] Supra, para. 51.
[74] Prosecution Response, Annex A; Defence Reply, Annex A.

57. I will further consider Facts 36, 38 (second paragraph only), 39, 41 (except the second paragraph) and Fact 42 according to the remaining criteria for judicial notice of adjudicated facts, below.

Facts relating to the RUF from February 1999 to September 2000

58. Defence Proposed Facts 43 through 48 relate to the RUF during the period February 1999 through September 2000.

59. The Prosecution objects that **Facts 43 and 44** go to central issues in the case.[75] Fact 43 relates to promotions made by Sam Bockarie in February 1999. The full text of Fact 44[76] relates to orders by Foday Sankoh to Bockarie and Sesay and persons under Sesay's control. I find that Facts 43 and 44 deal with the command structure of the RUF and the roles and responsibilities of alleged associates or subordinates of the Accused, but do not go to proof of the Accused's relationship or influence with the RUF or these alleged associates or subordinates. I refer to the findings in relation to Proposed Facts 15 and 16 above,[77] and find that these Facts are not crucial to the charges against the Accused so as to be considered central in this case.

60. The Defence agrees to the use of the full and exact text of paragraph 908 of the RUF Judgement in Defence Proposed **Fact 45** rather than the extracted and/or paraphrased versions objected to by the Prosecution.[78] The full text of Fact 45 details the various positions held by RUF members, including Foday Sankoh, following the signing of the Lomé Peace Accord. The Prosecution objects as going to central issues only to the final sentence of this fact which states, "In November 1999, the RUF transformed itself into the RUFP." I find that Fact 45 does not relate to the acts, conduct or mental state of the Accused, is not critical, and therefore is not central to the case.

61. The Defence objects to inclusion of the remainder of paragraph 913 of the RUF Judgement omitted from the text of **Fact 46**.[79] I find that the remainder of paragraph 913 helps to ensure that the fact has not been abstracted from the context of the RUF Judgement in an unclear or misleading manner, and find that it should be included in the text of Fact 46. The full text of Fact 46 relates to infighting between Bockarie and Sankoh about the implementation of the Lomé Peace Accord, Sankoh's plans to attack Bockarie in Buedu and Bockarie's departure to Liberia. The Prosecution

[75] Prosecution Response, Annex A.
[76] The Defence agrees to the full and exact text of paragraph 910 of the RUF Judgement in Defence Proposed **Fact 44** rather than the extracted version objected to by the Prosecution. Prosecution Response, Annex A; Defence Reply, Annex A.
[77] Supra, para. 31.
[78] Prosecution Response, Annex A; Defence Reply, Annex A.
[79] Defence Reply, Annex A.

objects that the whole of this fact goes to issues central to the case.[80] I find that this fact relates to the structure of the RUF and the relationship of associates and or subordinates of the Accused to each other, but does not touch upon the Accused's own relationship with the RUF nor those associates or subordinates. I refer to its findings in relation to Facts 10 and 11, above,[81] and for the same reasons find Fact 46 is not central to the case.

62. The Prosecution objects that **Fact 47** is "tendentious" and has been misleadingly re-formulated as it deliberately leaves out a reference from paragraph 916 of the RUF Judgement to Charles Taylor. The Defence argues that this fact has been extensively discussed by the Accused in his testimony, "but the fact as stated does not include acts and conduct of the Accused and therefore is admissible."[82] I find the reformulation of Fact 47 is incomplete and misleading without the reference to Charles Taylor and that it is inadequate to merely remove the reference to Mr. Taylor where the fact, in its essence, deals with an event in which he was present. I would therefore adopt the full text of paragraph 916 of the RUF Judgement as the text of Fact 47 to be considered.

63. The full text of Fact 47 relates to the lack of RUF leadership following Sankoh's arrest on 17 May 2000 and a subsequent request by ECOWAS leaders, including Charles Taylor, to Sesay to assume leadership of the RUF. The Prosecution objects that this fact goes to central issues in the case.[83] I note the reference in Fact 47 to the rational of the ECOWAS leaders, including Charles Taylor, in inviting Sesay to meet with them, namely, concern "that the absence of a recognized overall leader of the RUF could undermine the carefully negotiated peace process". I find that Fact 47 goes to the mental state or intentions of the Accused in relation to a meeting with an alleged subordinate or associate and that it is not suitable for judicial notice.

64. **Fact 48** relates to Sesay's consultation with RUF commanders and subsequent decision to accept the ECOWAS leaders proposal and assume the interim leadership of the RUF. The Prosecution objects that this fact is "[t]endentious as it ignores the considerable influence of the Accused at this point."[84] I find that Fact 48 deals with the structure of the RUF and the actions of an alleged subordinate and associate of the Accused, but does not touch upon the Accused's own relationship with the RUF nor with the alleged subordinate or associate. I refer to my findings in relation to Facts 10 and 11, above,[85] and for the same reasons find that Fact 48 is not central to the case.

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[80] Prosecution Response, Annex A.
[81] Supra, para. 29.
[82] Prosecution Response, Annex A; Defence Reply, Annex A.
[83] Prosecution Response, Annex A.
[84] Prosecution Response, Annex A.
[85] Supra, para. 29.

65. I will further consider Facts 43-46 and Fact 48 according to the remaining criteria for judicial notice of adjudicated facts, below.

C) **Deliberations on the remaining criteria for judicial notice of the Defence Proposed Facts:**

66. Having found that Defence Proposed Facts 1, 3, 4, 6, 10, 11, 15, 16, 18-21, 23-26, 27-31, 32 (excluding final sentence), 35, 36, 38 (final paragraph only), 39, 41 (excluding second paragraph), 42, 43-46 and 48 should not be excluded for consideration for judicial notice as a result of the specific objections dealt with above, I now turn to an examination of whether these facts satisfy the remaining criteria for judicial notice of adjudicated facts set out in the Applicable Law.

67. I find that each of these facts 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 RUF 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. I also find that each of these facts is sufficiently distinct, concrete and identifiable and has not been extracted in a manner which is misleading.

68. In view of the foregoing, I am satisfied that taking judicial notice of these facts pursuant to Rule 94 (B) would not only ensure the fair trial rights of the Accused but would also expedite the trial in as far as the Defence would not need to spend its scarce resources on calling oral testimony in relation thereto. It would at the same time promote judicial economy and the harmonization of judgements at the Special Court for Sierra Leone and accordingly I would take judicial notice of them pursuant to Rule 94(B).

69. For the foregoing reasons, I would have granted the Defence Motion to the extent indicated in this Opinion.

Done at The Hague, The Netherlands, this 17th day of June 2010.

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]