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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Pierre Boutet
Hon. Justice Bankole Thompson

Registrar: Herman von Hebel

Date: 23rd of June 2008

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

Public Document

DECISION ON SESAY DEFENCE APPLICATION FOR JUDICIAL NOTICE TO BE TAKEN OF ADJUDICATED FACTS UNDER RULE 94(B)

Office of the Prosecutor:
Mr. Peter Harrison
Mr. Joseph Kamara
Mr. Vincent Wagona
Mr. Reginald Fynn
Mr. Charles Hardaway

Defence Counsel for Issa Hassan Sesay:
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defence Counsel for Morris Kallon:
Mr. Charles Taku
Mr. Kennedy Ogeto
Ms. Tanoo Mylvaganam

Court-Appointed Counsel for Augustine Gbao:
Mr. John Cammegh
Mr. Scott Martin

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

SEISED of the Sesay Defence Application for Notice to be taken of Adjudicated Facts Pursuant to Rule 94(B), filed on the 23rd of May, 2008 ("Sesay Defence Application");

MINDFUL of the Addendum to Sesay Defence Application for Notice to be taken of Adjudicated Facts Pursuant to Rule 94(B), filed on the 30th of May, 2008 ("Sesay Defence Addendum");

MINDFUL of the Response filed by the Office of the Prosecutor ("Prosecution") on the 30th of May, 2008 ("Prosecution Response");

MINDFUL of the Sesay Defence Reply to the Prosecution Response, filed on the 4th of June, 2008 ("Sesay Defence Reply");

NOTING the Judgement of Trial Chamber II of the Special Court in the case of *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, rendered orally on the 20th of June, 2007 and filed on the 21st of June, 2007, as well as the Corrigendum to Judgement Filed on 21 June 2007, filed on the 19th of July, 2007 ("AFRC Trial Judgement");

NOTING the Judgement of the Appeals Chamber in the case of *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, filed on the 22nd of February, 2008 ("AFRC Appeals Judgement");

NOTING the Judgement of this Chamber in the case of *Prosecutor v. Moinina Fofana and Allieu Kondewa*, filed on the 2nd of August, 2007 ("CDF Trial Judgement");

NOTING the Judgement of the Appeals Chamber in the case of *Prosecutor v. Moinina Fofana and Allieu Kondewa*, filed on the 28th of May, 2008 ("CDF Appeals Judgement");

PURSUANT to Rules 26*bis*, 89(C) and 94(B) of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER ISSUES THE FOLLOWING DECISION:

I. BACKGROUND

1. The Sesay Defence requests that the Chamber take judicial notice under Rule 94(B) of 47 proposed facts adjudicated in the AFRC Trial and Appeals Judgements, and of a further 31 proposed facts adjudicated in the CDF Trial Judgement. Following the rendering of the CDF Appeals Judgement on the 28th of May, 2008, the Sesay Defence filed an Addendum to its original Application, requesting that the Chamber take judicial notice of a further four proposed facts adjudicated in the CDF Appeals Judgement. Thus, the Chamber is requested to take judicial notice, under Rule 94(B), of a total of 82 proposed facts adjudicated in the AFRC and CDF cases.

2. Oral hearings in the present case began on the 5th of July 2004, and the Prosecution closed its case on the 2nd of August 2006, after 182 days of trial. In total, 86 witnesses were heard in the case for the Prosecution and 190 Exhibits were admitted in evidence.[1] On the 25th of October, 2006, the Chamber rendered its Oral Decision on the RUF Motions for Judgement of Acquittal pursuant to Rule 98.[2]

3. The presentation of the case for the First Accused, Issa Hassan Sesay, began on the 3rd of May, 2007 and concluded on the 13th of March, 2008,[3] with one Sesay Defence Witness, former President Alhaji Tejan Kabbah, exceptionally being heard on the 16th of May, 2008 and the expert common to the Sesay and Gbao Defence to be heard on the 23rd and 24th of June, 2008.[4] The evidence of 58 witnesses was admitted into evidence as part of the Sesay Defence case. The Second Accused, Morris Kallon, presented his case between the 11th of April, 2008 and the 19th of May, 2008, calling a total of 15 witnesses in his defence. As of the 23rd of May, 2008, the date on which the Sesay Defence Application was filed, the Chamber had admitted in evidence the oral testimony or statements of 163 witnesses, along with 374 Exhibits. The Third Accused, Augustine Gbao, opened his case on the 2nd of June, 2008 and the completion of his case is scheduled for the 24th June, 2008, by which time it is anticipated that approximately 12 witnesses will have been called for the Gbao Defence.

[1] Transcript of 25 October 2006, Oral Decision on Rule 98 Motions, p. 2, lines 5-17.
[2] Transcript of 25 October 2006, Oral Decision on Rule 98 Motions.
[3] Transcript of 13 March 2008, Mr. Wayne Jordash, p. 55, line 21.
[4] Transcript of 16 May 2008.

II. SUBMISSIONS

1. The Sesay Defence Application and Addendum

4. The Sesay Defence submits that the 82 proposed facts contained in its Application and accompanying Addendum are relevant to the crimes charged in the Indictment,[5] are not controversial, and do not involve legal conclusions. The Sesay Defence argues that the proposed facts are fair and reliable.[6] In addition, judicially noticing the proposed facts would streamline the evidence that the parties must address in their closing briefs, and promote consistency amongst the judgements of the Special Court. The admission of the proposed facts is, therefore, in the interests of judicial economy and in the interests of justice. Judicial notice of the proposed facts also would be consistent with the rights of the accused and with the Chamber's duty to provide for a fair and expeditious trial.[7]

2. The Prosecution Response

5. The Prosecution responds that the wording of Rule 94(B) indicates that taking judicial notice of facts under said Rule is discretionary.[8] In the Prosecution's submission, the circumstances of the present Application weigh heavily against the exercise of the Chamber's discretion to admit the alleged adjudicated facts.[9]

6. Basing its arguments on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"),[10] the Prosecution argues that whereas facts judicially noticed under Rule 94(A) normally cannot be

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[5] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Sesay Defence Application for Notice to be taken of Adjudicated Facts Pursuant to Rule 94(B), 23 May 2008, para 1 ["Sesay Defence Application"].

[6] *Ibid.*, para 6.

[7] *Ibid.*, paras 2, 7-8.

[8] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Prosecution Response to Sesay Application for Notice to be taken of Adjudicated Facts Pursuant to Rule 94(B), 30 May 2008, para 3 ["Prosecution Response"].

[9] *Ibid.*, para 20.

[10] *Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric and Pusic*, Case No. IT-04-74-PT, 14 March 2006 (TC), para 10 ["*Prlic*"]; *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003, para 19 ["*Milosevic* Trial Chamber Decision"]; *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 12 June 2006 (AC), para 40 ["*Karemera* Appeals Chamber Decision on Judicial Notice"]; *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 (TC), para 16 ["*Krajisnik*"].

challenged during trial, taking judicial notice of a fact under Rule 94(B) only establishes a well-founded presumption of the accuracy of the fact. The opposing party may call evidence in rebuttal.[11] It should not be open to the Sesay Defence to have adjudicated facts admitted in evidence after the close of its case. Furthermore, such adjudicated facts could only be contested by the Prosecution if it were given the opportunity to call rebuttal evidence. As such, granting the Sesay Defence Application at this stage would not result in any judicial economy, and would be contrary to the principles of a fair trial.[12]

7. Following the ICTR and ICTY case-law, according to the Prosecution, the Chamber should adopt the following criteria to determine whether an adjudicated fact is admissible: the fact must be relevant and pertinent to an issue in the proceedings; the fact must be distinct, concrete and identifiable; the fact as formulated in the application must not differ in any substantial way from the formulation in the original judgement; the fact must not be unclear or misleading in the context in which it is placed in the motion; the fact must be identified with adequate precision; the fact must not contain characterisations of an essentially legal nature; the fact must not be based on an agreement between the parties or on facts voluntarily admitted in a previous case; the fact must not relate to the acts, conduct or mental state of the accused; and the fact must not be subject to pending appeal.[13]

8. The Prosecution also submits that the following factors weight against a Trial Chamber exercising its discretion to admit adjudicated facts: where the facts in question are unduly broad, vague, tendentious, or conclusory; whether the volume or type of evidence that could be expected in rebuttal may place a significant burden on the opposing party and jeopardise trial fairness; whether the proposed facts are unclear or inadequate in the original judgement; whether the proposed facts were fundamentally inconsistent with a second trial judgement; whether the Trial Chamber is unable to determine whether the facts refer to the acts, conduct or mental state of one of the accused due to a lack of specificity in the original judgement; whether the proposed facts go to issues which are at the core of the case; whether the facts are subject of reasonable dispute between the parties.[14]

[11] *Ibid.*, 6-8.
[12] *Ibid.*, paras 10-11, 19-20.
[13] *Ibid.*, para 12.
[14] *Ibid.*, paras 13-15.

9. Finally, the Prosecution submits that the proposed facts are not relevant to issues in the present case and that different evidence has been heard in this case.[15] Furthermore, the Prosecution argues that admitting the proposed facts would violate trial fairness and the principle of equality of arms, which guarantees operate in favour of the Prosecution as well as the Defence.[16]

3. The Sesay Defence Reply

10. The Sesay Defence replies that Rule 94(B) does not require that an Application for judicial notice to be taken of adjudicated facts be made before the close of the Applicant's case, nor can any such restriction be properly inferred.[17] The Sesay Defence also replies that because facts under appeal cannot be judicially noticed under Rule 94(B), it has brought this application at the earliest possible opportunity.[18] To adopt the Prosecution's argument that an Application under Rule 94(B) can only be brought prior to the close of a party's case, would result in only the Gbao Defence being able to apply for judicial notice of adjudicated facts.[19]

11. The Sesay Defence also replies that the Prosecution has not made a proper response to its Application because the Prosecution has not stated whether it disputes each fact proposed for judicial notice.[20] The Sesay Defence also argues that the opportunity to rebut judicially noticed adjudicated facts is "irrelevant where the facts in question are consistent with the case advanced by the Prosecution and which no party has sought to dispute during their case."[21] The Sesay Defence then goes on to submit that judicially noticing the proposed facts:

> would involve the selection of some of the facts over other contradictory facts led by the Prosecution and/or would create a presumption in favour of the accuracy of the facts but would not involve disputes between the Prosecution and the Defence. In these circumstances matters can properly be settled by judicial notice.[22]

The Sesay Defence argues that the Prosecution and the Sesay and Kallon Defence teams:

> have led evidence during their respective cases in support or otherwise of their positions in relation to these issues and purported disputes; no party can claim to

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[15] *Ibid.*, para 17.
[16] *Ibid.*, para 18.
[17] *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Sesay Defence Reply to Prosecution Response to Application for Notice to be Taken of Adjudicated Facts Pursuant to Rule 94(B), 4 June 2008, para 2 ["Sesay Defence Reply"].
[18] *Ibid.*, para 4.
[19] *Ibid.*, paras 3-4.
[20] *Ibid.*, paras 5-7.
[21] *Ibid.*, para 8.
[22] *Ibid.*, para 9.

> have not been given an ample opportunity to contest or lead evidence demonstrating their positions on these issues. The Gbao team, currently presenting its case, will have the same opportunity.[23]

12. The Sesay Defence argues that granting the Application would promote judicial economy because the proposed facts deal largely with the activities of the AFRC and CDF. By judicially noticing the proposed facts, the Chamber would allow the parties to focus their resources on addressing the acts and conduct of the RUF and the three Accused.[24]

13. The Sesay Defence further requests that the proposed facts be judicially noticed, and also requests that the Chamber order the Prosecution to address each proposed fact and to provide an explanation as to how the facts are not relevant to the case against the First Accused.[25]

III. THE APPLICABLE LAW

14. The Chamber recognises that the Rules allow for a variety of ways in which the parties may present evidence other than through *viva voce* testimony, including permitting parties to agree to facts under Rule 73*bis*(B)(ii) and (F), permitting parties to have documentary evidence and statements admitted under Rule 92*bis*, permitting the admission of expert reports directly in evidence under Rule 94*bis*, and allowing a Trial Chamber to take judicial notice of facts of common knowledge and adjudicated facts under Rule 94. Rule 94 provides:

> 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.[26]

15. Rule 94(B) states that a Chamber "may decide" to judicially notice adjudicated facts. Thus, the plain wording of the Rule vests a Trial Chamber with a discretionary power to take judicial notice of adjudicated facts [27]

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[23] *Ibid.*, para 10.
[24] *Ibid.*, para 14.
[25] *Ibid.*, para 14.
[26] Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 94 as amended 1 August 2003 ["Rules"].
[27] The corresponding Rules 94(B) of the ICTR and ICTY Rules of Procedure and Evidence are nearly identical. The Chamber, therefore, finds support for its conclusion in the clear and consistent jurisprudence of the ICTY and ICTR

16. The Chamber acknowledges that Rules 94(B) of the ICTY and ICTR are virtually identical to Rule 94(B) of the Rules of the Special Court.[28] Accordingly, guidance can be sought, persuasively, from the jurisprudence of those ad hoc Tribunals interpreting Rule 94(B).

1. The Legal Effect of Judicially Noticing an Adjudicated Fact

17. It is the Chamber's considered view that the rationale behind Rule 94 is two-fold. First, and foremost, Rule 94 aims 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. Second, Rule 94 aims to harmonise judgements in relation to certain factual issues that arise in multiple cases before the Special Court.[29]

18. Further, on a plain and ordinary interpretation of Rule 94, a Trial Chamber may take judicial notice of facts either pursuant to Rule 94(A) or pursuant to Rule 94(B). Facts judicially noticed under Rule 94(A) cannot be challenged during trial.[30] Under Rule 94(B), however, the facts in question must have been adjudicated in a different proceeding, between different parties, based on the evidence presented by those parties. The Chamber recognises that it is settled law that the proposed

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Appeals Chambers on this point: *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 (AC), para 5 ["*Dragomir Milosevic* Appeals Chamber Decision on Judicial Notice"]; *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 41; *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 (AC), p. 2 ["*Slobodan Milosevic* Appeals Chamber Decision on Judicial Notice"] and Sep. Op. Judge Shahabuddeen, 31 October 2003, para 6 ["Sep. Op. Shahabuddeen"]. See Prosecution Response, *supra* note 8, para 3.

[28] Rule 94(B) of the ICTR Rules of Procedure and Evidence Provides:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

Rule 94(B) of the ICTY Rules of Procedure and Evidence Provides:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

[29] *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 39; Sep. Op. Shahabuddeen, *supra* note 27, para 35; *Prosecutor v. Delic*, Case No. IT-04-83-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts, 9 July 2007 (TC), para 8 ["*Delic*"]; *Krajisnik*, *supra* note 10, para 11; *Prosecutor v. Mejakic, Gruban, Fustar and Knezevic*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004 (TC), p. 4 ["*Mejakic*"]; *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 January 2003 (TC), p. 4 ["*Ljubicic*"]; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 September 2001 (TC), paras 27-28 ["*Ntakirutimana*"]; *Prosecutor v. Sikirica*, Case No. IT-95-8-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000 (TC), p. 4 ["*Sikirica*"]. See also *Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-2004-14-AR73, Fofana-Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 16 May 2005 (AC), para 22 ["Fofana Appeals Chamber Decision on Judicial Notice"].

adjudicated facts must relate "to a matter at issue in the current proceedings."[31] Since the party not seeking judicial notice of proposed adjudicated facts did not have the chance to introduce evidence or make arguments in relation to the factual conclusions reached in a different case and their connection to the evidence heard in the present case, trial fairness requires that the opposing party be given the opportunity to challenge the accuracy of any facts admitted under Rule 94(B).[32] Consistent with the reasoning of the ICTY Appeals Chamber, this Chamber holds that Rule 94(B) creates a "well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial."[33]

2. Factors to be Considered in Determining whether an Adjudicated Fact may be Admitted in Evidence

9. The Chamber notes that Rule 94(B) does not define what constitutes an "adjudicated fact". Given that judicially noticing such an adjudicated fact has the effect of creating a well-founded presumption as to the accuracy of that fact, trial fairness requires that this term be defined and delimited. Based on settled international jurisprudence, the Chamber therefore opines that the following legal criteria must be met for a proposed fact to be considered an adjudicated fact susceptible of being judicially noticed at the discretion of a Trial Chamber:

a. The fact must be distinct, concrete and identifiable;[34]

b. The fact must be relevant and pertinent to an issue in the current case;[35]

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[31] Fofana Appeals Chamber Decision on Judicial Notice, *ibid.*, para 32.

[32] Rule 94(B).

[33] Sep. Op. Shahabuddeen, *supra* note 27, paras 3-37; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 (AC), paras 24-25 ["*Aleksovski*"].

[34] *Slobodan Milosevic* Appeals Chamber Decision on Judicial Notice, *supra* note 27, p. 3. See also *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 42; *Prosecutor v. Hadzihasanovic and Kubura*, 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 (TC), p. 3 ["*Hadzihasanovic*"]. See also Prosecution Response, *supra* note 8, paras 6-8.

[35] *Delic*, *supra* note 29, para 10; *Krajisnik*, *supra* note 10, para 14; *Hadzihasanovic*, *ibid.*, p. 3; *Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Miletic, Gvero and Pandurevic*, Case No. IT-05-88-T, 26 September 2006 (TC), para 6 ["*Popovic*"]; *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para 16 ["*Blagojevic*"]; *Prlic*, *supra* note 10, para 12. See also Prosecution Response *supra* note 8, para 12.

[36] Rules 89(C) and 94(B); *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 48; *Prosecutor v. Nikolic*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 (AC), paras 17, 48, 55-56 ["*Nikolic* Appeals Chamber Decision on Judicial Notice"]; *Delic*, *supra* note 29, para 10; *Popovic*, *ibid.*, para 5; *Ntakirutimana*, *supra* note 29, para 27; *Prlic*, *ibid.*, para 9; *Hadzihasanovic*, *supra* note 33, p. 4. See also Prosecution Response, *ibid.*, para 12.

c. The fact must not contain legal conclusions, nor may it constitute a legal finding;[36]

d. The fact must not be based on a plea agreement or upon facts admitted voluntarily in an earlier case;[37]

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;[38]

f. The fact must not go to proof of the acts, conduct or mental state of one of the accused persons.[39]

g. The fact must not be sufficient, in itself, to establish the criminal responsibility of an accused person.[40]

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,[41] 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.[42]

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[36] *Dragomir Milosevic* Appeals Chamber Decision on Judicial Notice, paras 19-22; *Hadzihasanovic*, *ibid.*, p. 3; *Delic*, *supra* note 29, para 10; *Popovic*, *ibid.*, para 10; *Krajisnik*, *supra* note 10, para 14; *Mejakic*, *supra* note 29, p. 4; *Blagojevic*, *supra* note 34, para 16; *Ntakirutimana*, *ibid.*, para 30; *Prlic*, *ibid.*, para 12; *Sikirica*, *supra* note 29, p. 4. See also: Fofana Appeals Chamber Decision on Judicial Notice, *supra* note 29, paras 32 and 28. See also Prosecution Response, *ibid.*, para 12.

[37] *Delic*, *ibid.*, para 10; *Popovic*, *ibid.*, para 11; *Ntakirutimana*, *ibid.*, para 26; *Krajisnik*, *ibid.*, para 14; *Mejakic*, *ibid.*, p. 4. See also Prosecution Response, *ibid.*, para 12.

[38] *Delic*, *ibid.*, para 10; *Hadzihasanovic*, *supra* note 33, p. 4 *Popovic*, *ibid.*, para 14; *Krajisnik*, *ibid.*, para 14; *Mejakic*, *ibid.*, p. 4; *Prlic*, *supra* note 10, para 12; *Blagojevic*, *supra* note 34, para 16; *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motion for Judicial Notice, 11 February 2004 (TC), paras 5-7 ["*Bicamumpaka*"]. See also Prosecution Response, *ibid.*, para 12.

[39] *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, paras 50-52; *Delic*, *ibid.*, para 10; *Blagojevic*, *ibid.*, para 16. See also Prosecution Response, *ibid.*, para 12. The interpretation of "acts and conduct" of an accused is the same under Rule 94(B) as under Rule 92*bis*: *Karemera* Appeals Chamber Decision on Judicial Notice, *ibid.*, para 52. On the interpretation of Rule 92*bis*, see *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92*bis*, 15 May 2008, paras 32-35 [*Sesay* 92*bis* Decision].

[40] *Karemera* Appeals Chamber Decision on Judicial Notice, *ibid.*, paras 47-48; *Krajisnik*, *supra* note 10, para 15. See also *Prlic*, *supra* note 10, para 12.

[41] *Delic*, *supra* note 29, para 10; *Popovic*, *supra* note 34, para 7; *Blagojevic*, *supra* note 34, para 16. See also Prosecution Response, *supra* note 8, para 12.

[42] *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 55; *Popovic*, *ibid.*, para 8. See also Prosecution Response, *ibid.*, para 12.

20. Furthermore, the Chamber also takes the view that even where a proposed adjudicated fact fulfils all of the aforementioned criteria; it retains the discretion not to take judicial notice of said fact if doing so will not best serve the interests of justice.[43]

21. In determining whether The Chamber should exercise its discretion to judicially notice an adjudicated fact that meets all of the criteria described above, The Chamber opines 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.[44] Other relevant factors in such a determination include: the stage of proceedings at the time the Application is brought;[45] the volume of evidence already led by the parties in respect of the proposed adjudicated facts;[46] whether the proposed adjudicated facts go to issues central to the present case;[47] 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.[48]

IV. DELIBERATIONS

22. The Chamber now proceeds to consider the merits of the Application in light of the applicable criteria.

1. Distinct, Concrete and Identifiable

23. The Chamber can only take judicial notice of facts that are distinct, concrete and identifiable. The Chamber finds that AFRC Trial Judgement fact 29 is not a clear and distinct finding of fact. Indeed, Trial Chamber II stated that the "route taken by this second group is not clear, but it appears that they travelled along a route similar to the one taken by the first advance team."[49] The Chamber

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[43] *Karemera* Appeals Chamber Decision on Judicial Notice, *ibid.*, para 41; *Hadzihasanovic*, *supra* note 33, p. 3; *Popovic*, *ibid.*, paras 4, 15; *Ntakirutimana*, *supra* note 29, para 28; *Mejakic*, *supra* note 29, p. 4.

[44] See *Delic*, *supra* note 29, para 11; *Krajisnik*, *supra* note 10, para 11; *Ntakirutimana*, *ibid.*, para 31; *Popovic*, *ibid.*, para 16;, *Milosevic* Trial Chamber Decision, *supra* note 10, para 11.

[45] *Blagojevic*, *supra* note 34, paras 22-23; *Hadzihasanovic*, *supra* note 33, p. 3.

[46] *Blagojevic*, *ibid.*, para 22.

[47] *Popovic*, *supra* note 34, para 19. See also Prosecution Response, *supra* note 8, para 14.

[48] *Mejakic*, *supra* note 29, p. 4; *Milosevic* Trial Chamber Decision, *supra* note 10, paras 9-13; *Popovic*, *ibid.*, para 16. See also Prosecution Response, *ibid.*, paras 13, 15

[49] Sesay Defence Application, Annex A, fact 29 reproducing a sentence from the AFRC Trial Judgement, para 196.

holds that this finding is not sufficiently certain in the original judgement to constitute an adjudicated fact under Rule 94(B). Accordingly, the Chamber declines to take judicial notice of it.

2. Relevance

24. The Chamber opines that only adjudicated facts which are relevant and pertinent to the current case are susceptible of being judicially noticed. Hence, the Chamber agrees with the holding of the ICTY Appeals Chamber in the *Nikolic* Decision, which emphasised that Rule 94 "is not a mechanism that may be employed to circumvent the general Rules governing the admissibility of evidence and litter the record with matters which would not be admitted otherwise."[50] It is our considered view that the requirement that the facts proposed for judicial notice be relevant to matters at issue in the case is closely linked to the purpose of Rule 94(B), that is, the need to promote judicial economy. The Chamber further adopts the holding of the ICTR Trial Chamber in *Ntakirutimana* that "matters which have only an indirect or remote bearing on the present case should not be the subject of judicial notice."[51] The law is that it is up to the party making the Application to demonstrate how the proposed adjudicated facts are related to the matters at issue in the current proceedings.[52] The Prosecution is not required to demonstrate, in its Response, that the proposed adjudicated facts are irrelevant to the current proceedings.[53]

25. The Chamber opines that where the relationship of the proposed adjudicated facts to matters at issue in the current proceedings is not sufficiently clear, taking judicial notice of said fact would serve only to clutter the evidentiary record; therefore, such a course would be contrary to the interests of judicial economy.[54] Hence, the Chamber finds that the Sesay Defence has not demonstrated that the following proposed adjudicated facts are relevant to issues in this case,[55] and therefore declines to judicially notice these facts: AFRC Trial Judgement fact 27; CDF Trial Judgement facts 1, 2, 3, 9, 10,

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[50] *Nikolic* Appeals Chamber Decision on Judicial Notice, *supra* note 35, para 17.
[51] *Ntakirutimana*, *supra* note 29, para 27.
[52] *Nikolic* Appeals Chamber Decision on Judicial Notice, *supra* note 35, para 11; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Reasons for Oral Decision Rendered 21 April 2004 on Appellant's Motion for Admission of Additional Evidence and for Judicial Notice, 17 May 2004, para 16; *Prlic*, *supra* note 10, para 9.
[53] See Sesay Defence Reply, *supra* note 17, para 14.
[54] *Nikolic* Appeals Chamber Decision on Judicial Notice, *supra* note 35, paras 17, 55-56; *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para 189; *Popovic*, *supra* note 34, para 5. See also The Chamber's holding in the *Sesay* 92*bis* Decision, *supra* note 39, paras. 45-46 and *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-14-T, Decision on Sesay Defence Application for a Week's Adjournment – Insufficient Resources in Violation of Article 17(4)(b) of the Statute of the Special Court (TC), 5 March 2008, para 43.
[55] Sesay Defence Application, *supra* note 5, para 1; Sesay Defence Reply, *supra* note 17, para 11.

1 , 12, 13, 14, 15, 16, 17, 18 (a) - (l),, 19, 20, 22, 23, 24, 25, 26, 27, 28, 30 and 31; and, CDF Appeals Judgement fact 1.

3. Legal Characterisations

25. Under Rule 94(B), the Chamber is vested with the discretionary authority to take judicial notice of facts adjudicated in earlier proceedings. Legal conclusions, legal characterisations and "the legal consequences inferred from facts", thus, may not be judicially noticed.[56] The Chamber is cognisant that many findings may have a legal aspect; therefore, each proposed adjudicated fact must be considered individually to determine whether it "contains findings or characterisations which are of an essentially legal nature".[57] Therefore, after careful consideration, the Chamber declines to admit the following proposed adjudicated facts as we find that they contain legal characterisations or legal conclusions inferred from facts: CDF Trial Judgement facts 4, 5 and 7;[58] and, CDF Appeals Judgement fact 4.

4. Adjudicated Facts under Appeal

27. The Chamber acknowledges that, as a matter of law, judicial notice should not be taken of findings of fact which could be revised on appeal; nevertheless, where particular facts are not themselves under appeal or subject to revision in connection with any ground of appeal, such facts may be judicially noticed under Rule 94(B).[59] It is, therefore, the considered view of the Chamber that an application for judicial notice under Rule 94(B) may be brought when a judgement is under appeal, provided that the particular facts in question have not been challenged or are not inextricably linked to a ground of appeal. Where proposed adjudicated facts have been the subject of an appeal, unless these factual findings have been upheld by the Appeals Chamber, the proposed facts may not be judicially noticed.

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[56] *Krajisnik*, *supra* note 10, para 14. For example, the ICTR Trial Chamber refused to take judicial notice of a statement that persons in Rwanda were protected, at the relevant time, by Common Article 3 of the Geneva Conventions and by Additional Protocol II, on the basis that the statement constituted a legal interpretation of a fact: *Ntakirutimana*, *supra* note 29, para 49.

[57] *Dragomir Milosevic* Appeals Chamber Decision on Judicial Notice, *supra* note 27, para 22.

[58] See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Judgement, 28 May 2008 (AC), paras 71-73, 75 ["CDF Appeals Judgement"].

[59] Sep. Op. Shahabudeen, *supra* note 27, para 34; *Krajisnik*, *supra* note 10, para 14; *Delic*, *supra* note 29, paras 10, 13; *Bicamumpaka*, *supra* note 38, para 8; *Blagojevic*, *supra* note 34, para 19; *Popovic*, *supra* note 34, para 14; *Ljubicic*, *supra* note 29, p. 6; *Mejakic*, *supra* note 29, p. 4; *Hadzihasanovic*, *supra* note 33, p. 3.

28. The Chamber notes that the effect of taking judicial notice of adjudicated facts under Rule 94(B) is that they are admitted in evidence. In the Chamber's considered opinion, such a motion normally should be brought prior to the close of a party's case. While not barring the Sesay Defence Application,[60] the Chamber considers the timing of the Application, and the concomitant effect on the fairness and expeditiousness of the trial, as factors weighing against the exercise of its discretion to judicially notice the proposed adjudicated facts.

5. Formulation of the Proposed Adjudicated Facts

29. It is also the Chamber's view of the law that judicial notice should not be taken of proposed adjudicated facts if the manner in which they are formulated, abstracted from the context of the original judgement, is either misleading or inconsistent with the facts as they were adjudicated and appear in the original judgement.[61] We strongly opine that facts taken out of context in this way cannot be considered "adjudicated facts" pursuant to Rule 94(B).[62]

30. After carefully reviewing the proposed adjudicated facts, the AFRC Trial Judgement, the AFRC Appeals Judgement, the CDF Trial Judgement and the CDF Appeals Judgement, the Chamber concludes that certain proposed facts have been taken out of context. It is our observation that some proposed adjudicated facts appear in the original judgement in a context that included findings relating to the RUF or its members.[63] It is also our observation that some facts omit the second clause of the sentence, which contains a factual finding that could be unfavourable to the Accused.[64] The Chamber, likewise, finds that as formulated, these proposed facts are misleading or incomplete. We further note that certain other facts have been combined and incompletely referenced.[65] Finally, it is evident that the formulation of certain of the proposed adjudicated facts is not substantially similar to the formulation of those facts in the original judgement.[66]

31. For these reasons, the Chamber declines to exercise its discretion to take judicial notice of the following facts: AFRC Trial Judgement facts 2, 3, 8, 12, 15, 18, 19, 20, 21, 38, 43, 45 and 47;[67] and,

[60] See Sesay Defence Reply, *supra* note 17, paras 1-4.
[61] *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 55.
[62] *Ibid.*
[63] See, for example: Sesay Defence Application, *supra* note 5, Annex A, AFRC Trial Judgement facts 8, 15, 21, 38.
[64] See, for example: *ibid.*, Annex A, AFRC Trial Judgement facts 2, 18, 19, 43.
[65] See, for example: *ibid.*, Annex A, AFRC Trial Judgement fact 3.
[66] See, for example: *ibid.* Annex A, AFRC Trial Judgement facts 12, 20, 21, 45.
[67] *Ibid.*, Annex A.

CDF Appeals Judgement facts 2 and 3.[68] In addition, CDF Trial Judgement fact 6 refers to crimes committed by the Kamajors "during the second and third attacks".[69] The Chamber considers that this formulation is not sufficiently precise; therefore, declines to take judicial notice of the proposed fact.

6. Discretionary Considerations

32. It is trite law that Rule 94(B) is designed to relieve the party making the Application of the burden of proving certain facts that have already been adjudicated in other proceedings before this Tribunal. It is also trite law that the opposing party may then put these facts in question by leading "reliable and credible evidence to the contrary."[70] It cannot be controverted that 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. Hence, it is the Chamber's view that Rule 94(B) does not prevent the Prosecution from contesting the factual findings made in a different case, based on the evidence and arguments heard in that case, even where those findings may have been consistent with the case advanced by the Prosecution in the other proceedings.[71] Moreover, it is not sufficient that the parties have had the opportunity to call evidence in relation to the issues raised by the proposed adjudicated facts prior to the Sesay Defence Application being made.[72]

33. Should the Chamber take judicial notice of the adjudicated facts proposed in the Sesay Defence Application, trial fairness would require that the Prosecution be given the opportunity to call rebuttal evidence. Such a course of action would certainly prolong the proceedings and needlessly complicate the evidentiary record. Above all, it would be counterproductive in terms of promoting judicial economy.

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[68] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Addendum to Sesay Defence Application for Notice to be taken of Adjudicated Facts pursuant to Rule 94(B), 30 May 2008, Annex C ["Sesay Defence Addendum"]. The Chamber notes that the original formulation of CDF Appeals Judgement fact 3 is a legal characterisation rather than an adjudicated fact: "...in the view of the Appeals Chamber, the context of the commission of the crimes, remote from military operations, supports a reasonable conclusion that the 'attacks' were, in fact, specifically 'directed against' a civilian population, within the meaning of Article 2 of the Statute": CDF Appeals Judgement, *supra* note 59, para 306.

[69] Sesay Defence Application, *supra* note 5, Annex B.

[70] *Karemera* Appeals Chamber Decision on Judicial Notice, *supra* note 10, para 42; *Aleksovski*, *supra* note 32, paras 24-25. See also *Krajisnik*, *supra* note 10, para 16.

[71] See Sesay Defence Reply, *supra* note 17, paras. 7-8.

[72] See Sesay Defence Reply, *supra* note 17, para 10.

34. The Chamber has heard extensive evidence in relation to the interaction between the AFRC and the RUF during the Indictment period, including evidence relating to the relationship between the command structures of the two organisations and whether a shared command structure existed at certain times. The Chamber has also heard a significant amount of evidence regarding the cooperation and disagreements between the two factions at various times and in various locations. Given the state of the evidence, the interests of justice demand the adoption of no other process than that the Chamber should make its own determination of these important facts rather than adopt as a rebuttable presumption, at this delicate stage, the findings of a previous Trial Chamber.[73]

35. In conclusion, the Chamber wishes to emphasise in plain language that the trial of Issa Sesay, Morris Kallon and Augustine Gbao is almost finished. The First Accused closed his case roughly two months prior to bringing this Application. In its final deliberations, the Trial Chamber is judicially obligated to assess the weight of any adjudicated facts that are judicially noticed, in light of all the evidence presented in the case.[74] 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 of the 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.[75]

36. The Chamber, therefore, declines to judicially notice the following facts: AFRC Trial Judgement Facts 1, 4, 5, 6, 7, 9, 10, 11, 13, 14, 16, 17, 22, 23, 24, 25, 26, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 44 and 46; and, CDF Trial Judgement facts 8, 21 and 29.

V. DISPOSITION

37. Having carefully considered each of the proposed adjudicated facts, and bearing in mind the factors articulated in the foregoing paragraphs, the Chamber declines to take judicial notice of the following proposed adjudicated facts for failing to fulfil the requirements previously listed in

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[73] See *Blagojevic*, *supra* note 34, para 23; *Ntakirutimana*, *supra* note 29, para 35; *Popovic*, *supra* note 34, para 19. For an example of a proposed fact upon which The Chamber prefers to make its own finding, see Sesay Defence Application, *supra* note 5, Annex A, AFRC Trial Judgement fact 23. Trial Chamber II held that there was "no evidence that the RUF was involved in these deliberations." Different evidence has been led in this case, and The Chamber will make its determination on the basis of that evidence. In addition, the formulation of this fact in the Sesay Defence Application is also misleading.

[74] See *Popovic*, *ibid.*, para 21; *Hadzihasanovic*, *supra* note 33, p. 5.

[75] See *Ntakirutimana*, *supra* note 29, para 31.

paragraph 19: (i) AFRC Trial Judgement facts 2, 3, 8, 12, 15, 18, 19, 20, 21, 27, 29, 38, 43, 45, 47;[76] (ii) CDF Trial Judgement facts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 30 and 31; and (iii) CDF Appeals Judgement facts 1, 2, 3 and 4.

38. In addition, the Chamber, exercising its discretion, declines to take judicial notice of the following proposed adjudicated facts on the grounds that taking such notice would be inimical to judicial economy or certainly would not be in the interests of justice: (i) AFRC Trial Judgement Facts 1, 4, 5, 6, 7, 9, 10, 11, 13, 14, 16, 17, 22, 23, 24, 25, 26, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 44 and 46; and (ii) CDF Trial Judgement facts 8, 21 and 29.

39. In the light of the foregoing considerations, and pursuant to the provisions of Rules 26*bis*, 89(C) and 94(B) of the Rules of Procedure and Evidence:

THE CHAMBER HEREBY DISMISSES the Sesay Defence Application.

Done at Freetown, Sierra Leone, this 23rd day of June 2008.

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[76] Sesay Defence Application, *supra* note 5, Annex A.