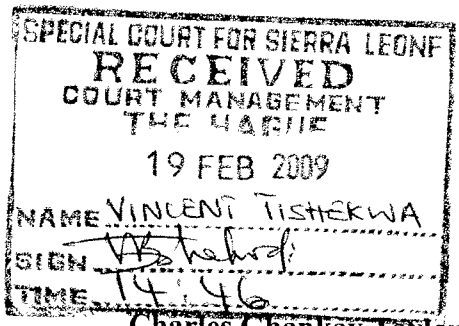
7381 SCSL-03-01-T (24253-24286) 24253

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 19 February 2009



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC WITH ANNEX A

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

Office of the Prosecutor:
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I. INTRODUCTION

1. The Prosecution files this Response to the "Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement[1] pursuant to Rule 94(B)" filed on 9 February 2009 ("Defence Application").[2]

2. The Defence Application should be denied. The exercise of the Trial Chamber's discretion to take judicial notice of the proposed adjudicated facts would be contrary to the interests of justice and would not promote judicial economy, and the Defence has failed to satisfy several underlying criteria for judicial notice of adjudicated facts.

II. LEGAL EFFECT OF JUDICIAL NOTICE UNDER RULE 94(B)

3. Judicially noticing an adjudicated fact has the legal effect of establishing a "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".[3] Taking judicial notice of an adjudicated fact therefore results in the burden of proof to disqualify the fact being shifted to the disputing party. In order to safeguard the fairness of the trial, the opposing party is permitted "to challenge the fact during trial by submitting evidence that calls into question the veracity of the adjudicated facts".[4] Accordingly, "[i]f, during trial, a Party wishes to dispute an adjudicated fact of which the Trial Chamber has taken judicial notice [...] that Party must then bring out the evidence in support of its contest and request the Chamber to entertain the challenge".[5]

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[1] *Prosecutor v. Brima. Kamara, Kanu*, SCSL-04-16-T-613, Trial Judgement, 20 June 2007, ("**AFRC Judgement**").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-723, "Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)", 9 February 2009, ("**Defence Application**").
[3] *Prosecutor v. Slobodan Milosevic*, 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, cited in *Sesay* Adjudicated Facts Decision, para. 18. See also *Prosecutor v. Momcilo Krajisnik*, IT-00-39-T, "Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts", 24 March 2005, ("***Krajisnik* Decision of 24 March 2005**"), para. 13.
[4] *Prosecutor v. Krajisnik*, IT-00-39-PT, "Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis", 28 February 2003, ("***Krajisnik* Decision of 28 February 2003**"), para. 16.
[5] *Krajisnik* Decision of 28 February 2003, para. 17.

III. THE TRIAL CHAMBER'S EXERCISE OF ITS DISCRETION

4. In contrast to Rule 94(A), according to which judicial notice is mandatory, Rule 94(B) vests a Chamber with a discretionary power to take judicial notice of adjudicated facts.[6] Trial Chamber I has set out the legal criteria to be met in order for a proposed fact to be considered an adjudicated fact susceptible of being judicially noticed at the discretion of a Chamber.[7] These criteria are based on a distillation of the relevant jurisprudence of international tribunals. Even if all the applicable criteria are fulfilled, the Trial Chamber retains its discretion to refuse to take judicial notice of adjudicated facts where to do so would not serve the interests of justice.[8] Trial Chamber I has opined that "the overriding consideration is whether taking judicial notice of the [adjudicated] fact will promote judicial economy while ensuring that the trial is fair, public and expeditious."[9] As recognized by the ICTY Appeals Chamber, the guarantee of a fair trial applies to the Prosecution as well as to the Defence.[10]

5. Trial Chamber I has noted that "[i]t 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."[11] It is to be recalled that the initial Prosecution approach was to join the AFRC and RUF Accused as they were charged with acting in concert as part of a common plan, purpose or design to commit the same crimes in the course of the same transaction.[12] When, based on the Trial Chamber's assessment of the interests of justice,

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[6] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-1184, "Decision on Sesay Defence Application for Judicial Notice to be Taken of Adjudicated Facts under Rule 94(B)", 23 June 2008, ("***Sesay* Adjudicated Facts Decision**"), para. 15.
[7] *Sesay* Adjudicated Facts Decision, para. 19.
[8] *Sesay* Adjudicated Facts Decision, para. 20.
[9] *Sesay* Adjudicated Facts Decision, para. 21.
[10] *Prosecutor v. Aleksovski*, IT-95-14/1, "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, para. 25. See also *Prosecutor v. Delalic et al*, IT-96-21-T, "Decision on the Prosecution's Motion for an order Requiring Advance Disclosure of Witnesses by the Defence", 4 February 1998, para. 49: "There is no doubt that procedural equality means [...] equality between the Prosecution and the Defence," and *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, "Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts", 1 December 2000, para. 36: "We have to ensure the fairness of the trial to both parties, and we also have to ensure that this trial is conducted expeditiously".
[11] *Sesay* Adjudicated Facts Decision, para. 32.
[12] *Prosecutor v. Sesay*, SCSL-2003-05-PT-079, "Prosecution Motion for Joinder", 9 October 2003, in particular paras. 18 – 22, is representative of the 6 motions filed.

joinder was allowed only for Accused within the AFRC and those within the RUF[13], the Prosecution properly focused primarily on the particular Accused in each of the two cases. The current trial brings the focus back to the relationship of the AFRC and RUF to the crimes committed in the course of the same transaction, the Accused's relationship to both groups, the concerted action of the AFRC, RUF and the Accused in connection to those crimes, and the participation of the AFRC, RUF and the Accused in a common plan, purpose or design.

6. The facts before the Trial Chamber in this case reflect that broader focus, and it is those facts which should be controlling. The Defence will have the opportunity to present evidence, to be considered in the same way the Prosecution evidence is considered. No interest of justice would be achieved by giving the proposed evidence of the Defence a presumption of accuracy and the Trial Chamber should base its findings on the evidence before it in the current case.

The proposed adjudicated facts go to issues central to the present case

7. Judicial notice of the proposed adjudicated facts would be inappropriate because, to the extent that they are relevant, they relate to central issues in this case,[14] namely the relationship between the AFRC and RUF, including the involvement of the AFRC and RUF in the operation/s culminating in the attack on Freetown in January 1999, and the relationship between the Accused and members of this alliance.[15] This Trial Chamber has heard extensive testimony on these issues, including the coordinated offensive of RUF and AFRC forces in late 1998 that led to the invading forces entering Freetown in January 1999[16]; provision of arms and ammunition from various sources to these invading

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[13] *Prosecutor v. Sesay et al*, SCSL-2003-05-PT-096, "Decision and Order on Prosecution Motions for Joinder", 27 January 2004.
[14] *Sesay* Adjudicated Facts Decision, para. 21.
[15] These central issues are apparently in dispute, despite the following Agreed Facts from which this Defence team has never withdrawn:

30. Shortly after the AFRC seized power, the RUF joined with the AFRC in governing Sierra Leone.
31. On about 6 January 1999, inter alia, RUF and AFRC forces attacked Freetown.

Prosecutor v Taylor, SCSL-03-01-PT-227, "Joint Filing by the Prosecution & Defence Admitted Facts & Law", 26 April 2007.
[16] See e.g. Isaac Mongor.

forces[17]; the relationship and communications between Sam Bockarie and Alex Tamba Brima following the death of SAJ Musa, including that Brima was subordinate to and taking orders from Bockarie[18]; Bockarie's orders to burn and commit other crimes[19]; communications by RUF radio operators to radio operators in Freetown warning the forces in Freetown about ECOMOG jet raids; the presence of RUF and Liberian fighters sent by Charles Taylor among the invading forces[20]; the arrival and attacks in the peninsula of forces under Boston Flomo (aka RUF Rambo) and Dennis Mingo in an attempt to relieve or reinforce the forces within the city[21]; the willing engagement by Flomo's fighter's against the ECOMOG contingent at Jui in order to provide troop support to fighters in Freetown; the successful provision of a contingent of fighters under "Rambo Red Goat" to forces within Freetown[22]; the role of these and other commanders in organizing a fighting withdrawal from Freetown after the initial force was driven out of the State House area by ECOMOG and the eventual regrouping of forces at Waterloo and subsequent attempt to re-attack Freetown[23]. While some of these were not central issues in the AFRC trial, they are all clearly central to the charges against the Accused.[24]

8. Several other examples further illustrate the central issues to which the requested facts relate. *Fact 3*, concerning the command structure within and between the RUF and AFRC during the Junta, relates to a key issue and the evidence, including that of the radio operators, is more detailed in this case.[25] *Fact 7* also deals with this relationship, in particular in regard to Johnny Paul Koroma and the RUF leadership. The more detailed evidence in this case comes from a variety of perspectives and paints a more complete and nuanced picture. For example, in contrast to the requested fact that when Johnny Paul Koroma arrived in Kailahun "he encountered a hostile RUF leadership", the evidence in this case is that Johnny Paul Koroma encountered a welcoming RUF leadership and that

[17] See e.g. Alice Pyne.
[18] See e.g. Dauda Fornie.
[19] See e.g. Alice Pyne.
[20] See e.g. AB Sesay.
[21] See e.g. P149 which states that fighters arrived in Waterloo "Displaced and Refugee Camp" on January 6; see also Alice Pyne who testified to fighters under Superman arriving at Yam's Farm on January 8, 1999.
[22] See e.g. Perry Kamara and A.B. Sesay.
[23] See e.g. A.B. Sesay.
[24] This evidence relating to the central issues in this case negates the propriety of taking judicial notice of any of the adjudicated facts, in particular Facts 1, 8, 9, 12, 13, 14 and 15.
[25] See e.g. Perry Kamara and Foday Lansana.

only after the incident related to diamonds was there a dispute.[26] As to *Fact 2*, the movements and locations of Sam Bockarie during the Junta period go to a core issue in the current case concerning the relationship between the AFRC and RUF, command relationships and control over diamond mining areas and diamond mining.[27] In relation to *Fact 5*, this Trial Chamber has heard evidence from several different perspectives suggesting that large parts of the initial retreat were organized in that Sam Bockarie was coordinating the movements of Johnny Paul Koroma and other high level AFRC and RUF commanders.[28] Significantly this Trial Chamber has also heard evidence of the Accused's direct participation and role in aspects of the initial retreat and the overall retreat.[29]

9. It would not be in the interests of justice in the present case to take judicial notice of facts relating to these central issues.[30] Indeed, in the *Sikirica* case, cited by the Defence as authority for the proposition that the purpose of Rule 94(B) is to narrow the factual issues in dispute, the Trial Chamber only took judicial notice of facts which were not the subject of reasonable dispute and not "facts which involve interpretation".[31]

The Late Stage of the Proceedings and the Volume of Evidence Already on the Record

10. The interest of judicial economy would not be advanced by granting the Defence Application. It was only after the Prosecution had announced that it had called its last witness that the Defence filed its Application. None of the findings from the AFRC Judgement which are the subject of the Application were contested in the parties' notices

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[26] See e.g. Samuel Kargbo.
[27] See e.g. Karmoh Kanneh, who testified that Sam Bockarie led the offensive to capture Tongo diamond field in August 1997.
[28] See e.g. Samuel Kargbo.
[29] See e.g. Samuel Kargbo.
[30] See *Prosecutor v. Popovic et al*, IT-05-88-T, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 26 September 2006, ("***Popovic* Decision**"), para. 19, where the Trial Chamber excluded in the interests of justice a number of proposed adjudicated facts which went to issues which were at the core of the case.
[31] *Prosecutor v Sikirica et al.*, IT-95-8, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 27 September 2000. More recently it has been held that "[a]s a party may challenge, at trial, a fact that has been judicially noticed, it follows that a Chamber is not restricted to taking judicial notice of facts that are not the subject of dispute between the parties." *Prosecutor v. Jadranko Prlic et al.*, IT-04-74-PT, "Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B)", 14 March 2006. See also *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", 22 November 2001, ("***Ntakirutimana* Decision**"), para. 29, where the Trial Chamber stated it would avoid taking judicial notice of facts that are the subject of reasonable dispute. "Such matters should not be settled by judicial notice, but should be determined on the merits after the parties have had the opportunity to submit evidence and arguments."

of appeal in that case, filed on 2 August 2007, over five months before the first witness was called in the current trial. The Defence offers no explanation for this delay. Trial fairness would require that the Prosecution be given the opportunity to consider calling "rebuttal" evidence, either before the close of its case, or in a rebuttal case. [32] Notably, Trial Chamber I has stated 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."[33] Any rebuttal exercise would consume additional time and resources which would not be justified by the mere presumption of accuracy accorded to certain facts.[34]

11. The Defence erroneously conflates Rule 94(A) and Rule 94(B) by relying on the *Bizimungu* case in support of its argument that Rule 94(B) may be invoked at any stage of the proceedings. The *Bizimungu* decision concerned judicial notice of facts of common knowledge under Rule 94(A), where judicial notice is mandatory and rebuttal evidence is not permissible.[35] In *Ntakirutimana* and *Hadzihasanovic,* the Trial Chambers considered the stage of the proceedings at which motions for judicial notice of adjudicated facts were brought. Neither case assists the Defence. In *Ntakirutimana,* where the motion was brought by the prosecution after its case had concluded but before the defence case had commenced, the Trial Chamber determined that "at this stage of the proceedings, [it] is not inclined to view judicial notice as significantly influencing judicial economy".[36] In the *Hadzihasanovic* case, in which the defence brought a motion for judicial notice of adjudicated facts after the prosecution case and one defence case had been concluded, the Trial Chamber considered the advanced stage of the proceedings in regard to its obligation to ensure a fair trial.[37] The late stage of the filing of the motion for judicial notice of adjudicated facts in the *Sesay* case was emphasized strongly by Trial Chamber I,

[32] *Sesay* Adjudicated Facts Decision, para. 33.
[33] *Sesay* Adjudicated Facts Decision, para. 32.
[34] See *Krajisnik* Decision of 24 March 2005, para. 16.
[35] *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, "Decision on Prosecutor's Motion for Judicial Notice", 22 September 2006..
[36] *Ntakirutimana* Decision, para. 31.
[37] *Prosecutor v. Enver Hadzihasanovic and Amir Kubura*, IT-01-47-T, "Decision on Judicial Notice of Adjudicated Facts following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005", 14 April 2005.

this being a significant factor in the exercise of the Trial Chamber's discretion not to admit a number of facts that otherwise fulfilled the criteria for judicial notice.[38]

12. The Prosecution is clearly disadvantaged. If the Application were to be granted at this late stage, the effect would be that the Prosecution presented its entire case without the knowledge of its burden to overcome a rebuttable presumption as to the veracity of certain now judicially noticed facts.

13. The volume of evidence already led in respect of the issues contained in the proposed adjudicated facts is a further factor that goes against taking judicial notice. The effect of judicial notice at this stage of the trial would simply be to "complicate the evidentiary record"[39] as well as the Trial Chamber's task of assessing the evidence at the end of the case, which would be contrary to the promotion of judicial economy. By filing this Application after the Prosecution has completed the presentation of its evidence, the Defence is asking the Trial Chamber to perform a mental somersault – to adopt a rebuttable presumption *after* the presentation of the rebutting evidence.

14. Granting the Defence Application would be contrary to the interests of justice and would not achieve judicial economy. The Defence is not assisted by the jurisprudence cited in support of its argument that the Chamber's discretion should be exercised in its favour.[40] The Defence Application should be denied as it is contrary to factors which have been recognized as influencing the exercise of the Chamber's discretion.[41]

IV. CRITERIA FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

15. In addition, aside from failing to satisfy the criteria relating to the exercise of the Chamber's discretion, the requested adjudicated facts fail to satisfy several of the

[38] *Sesay* Adjudicated Facts Decision, paras 35 and 36.
[39] *Sesay* Adjudicated Facts Decision, para. 35.
[40] *Prosecutor v. Dragomir Milosevic*, IT-98-29/1-T, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff", 10 April 2007, para. 28; *Prosecutor v. Mejakic*, IT-02-65-PT, "Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B)", 1 April 2004; *Krajisnik* Decision of 24 March 2005, para. 12.
[41] *Sesay* Adjudicated Facts Decision, para. 21.

recognized admissibility criteria that are required to be satisfied before the exercise of the Trial Chamber's discretion to take judicial notice comes into play.[42]

Fact must be distinct, concrete and identifiable

16. Clarity as to the specific fact put forward for judicial notice is essential.[43] The Defence has not listed the majority of the facts singly but rather in paragraphs, sometimes mixing principal and accessory facts in a manner that obscures the principal fact it seeks to have judicially noticed. This is particularly true of Facts 1, 5, 6 and 8. Fact 7 makes reference to a time period, namely "the remaining period covered by the Indictment" which is not a time period that can be transported directly to the current case where the Indictment against the Accused covers a different period.

Fact must be relevant and pertinent to an issue in the current case

17. The burden is on the moving party "to demonstrate how the facts [...] sought to be judicially noticed are related to the matters at issue in the current proceedings"[44], and not just "remotely connected" to them.[45] The evidentiary record should not be overburdened by irrelevant facts.[46] The Defence has failed to meet this burden separately for each of the adjudicated facts for which judicial notice is requested. It is not sufficient to point in general terms to the "obvious relevance" of the facts.[47] In particular, Facts 6, 9, 10, 11 and 12 lack relevance, or are only tangentially relevant or relevant in part.

Facts must not have been reformulated in a misleading fashion and must not be tendentious

18. The Prosecution has set out in Annex A an overview of its objections to misleading omissions and misstatements in Facts 1, 2, 3, 5, 7 and 8 and to their tendentious nature.

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[42] *Sesay* Adjudicated Facts Decision, para. 19. See also *Popovic* Decision, para. 4.
[43] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, "Decision on the Prosecutor's Motion and Notice of Adjudicated Facts", 10 December 2004, ("***Bizimungu* Adjudicated Facts Decision**"), para. 13. Judicial notice must be denied where "a purported fact is inextricably commingled either with other facts that do not themselves fulfill the requirements for judicial notice under Rule 94(B), or with other accessory facts that serve to obscure the principal fact." See also *Popovic* Decision, para. 6.
[44] *Ntakirutimana* Decision, para. 27, cited with approval by the ICTY Appeals Chamber in *Nikolic v. Prosecutor*, IT-02-60/1-A, "Decision on Appellant's Motion for Judicial Notice", 1 April 2005, para. 11.
[45] *Bizimungu* Adjudicated Facts Decision, para. 11, referring to *Ntakirutimana* Decision. See also *Bizimungu* Adjudicated Facts Decision, paras 19 and 25.
[46] *Popovic* Decision, para. 5.
[47] Defence Application, para. 12.

V. CONCLUSION

19. For the reasons discussed above, the Trial Chamber should reject the Defence Application.

Filed in The Hague,

19 February 2009,

For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

Prosecutor v. Taylor – Case No. SCSL-03-01

Prosecutor v. Taylor, SCSL-03-01-T-723, "Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B)", 9 February 2009.

Prosecutor v Taylor, SCSL-03-01-PT-227, "Joint Filing by the Prosecution & Defence Admitted Facts & Law", 26 April 2007.

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Prosecutor v. Brima, Kamara, Kanu, SCSL-04-16-T-613, Trial Judgement, 20 June 2007.

Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-04-15

Prosecutor v Sesay, Kallon, Gbao, SCSL-04-15-T-1184, "Decision on Sesay Defence Application for Judicial Notice to be Taken of Adjudicated Facts under Rule 94(B)", 23 June 2008.

Prosecutor v. Sesay, SCSL-2003-05-PT-079, "Prosecution Motion for Joinder", 9 October 2003

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ICTY

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Prosecutor v. Popovic et al, IT-05-88-T, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 26 September 2006

http://www.icty.org/x/cases/popovic/tdec/en/060926-2.pdf

Prosecutor v Sikirica et al., IT-95-8, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 27 September 2000.

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Prosecutor v. Jadranko Prlic et al., IT-04-74-PT, "Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B)", 14 March 2006.

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Prosecutor v. Dragomir Milosevic, IT-98-29/1-T, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff", 10 April 2007.

Copy attached

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http://www.icty.org/x/cases/mejakic/tdec/en/040401.htm

Nikolic v. Prosecutor, IT-02-60/1-A, "Decision on Appellant's Motion for Judicial Notice", 1 April 2005.

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Prosecutor v. Ntakirutimana, ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", 22 November 2001

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Prosecutor v. Bizimungu et al, ICTR-99-50-T, "Decision on Prosecutor's Motion for Judicial Notice", 22 September 2006.

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***Prosecutor v. Dragomir Milosevic*, IT-98-29/1-T, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff", 10 April 2007.**

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-29/1-T

Date: 10 April 2007

Original: English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: **Mr. Hans Holthuis**

Decision of: **10 April 2007**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND PROSECUTION'S CATALOGUE OF AGREED FACTS WITH DISSENTING OPINION OF JUDGE HARHOFF

The Office of the Prosecutor:

Mr. Alex Whiting
Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

I. INTRODUCTION

1. **TRIAL CHAMBER III** ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the "Prosecution's Motion for Judicial Notice of Adjudicated Facts", filed by the Office of the Prosecutor ("Prosecution") on 18 December 2006 ("Motion"). The Trial Chamber is also seised of the "Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts", filed by the Defence ("Defence") on 19 January 2007 ("Response") and the "Prosecution's Request for Leave to Reply and Reply to Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts", filed by the Prosecution on 25 January 2007 ("Reply").

2. In the Motion, the Prosecution requests, pursuant to Rule 94(B) of the Rules of Procedure and Evidence ("Rules"), that the Trial Chamber take judicial notice of 181 facts ("Proposed Facts") which it claims were adjudicated in the case of *Prosecutor v. Galić*, Case No. IT-98-29 ("*Galić* Case") in the Trial Chamber Judgement rendered on 5 December 2003 ("*Galić* Trial Judgement") and in the Appeals Chamber Judgement rendered on 30 November 2006 ("*Galić* Appeal Judgement").

3. The Trial Chamber is further seised of oral submissions by the Parties in response to questions posed by the Trial Chamber, given during a hearing of 12 February 2007.[1]

4. The Trial Chamber is also seised of the "Prosecution's Catalogue of Facts Agreed Between the Prosecution and Defence", filed by the Prosecution on 28 February 2007 ("Agreed Facts") and endorsed by the Defence[2], informing the Trial Chamber of twenty-nine facts to which the parties have agreed, pursuant to Rule 65 *ter* (E) and listed in the Annex to the Catalogue.

II. SUBMISSIONS

A. Written Submissions

5. With regard to judicial notice pursuant to Rule 94(B) of the Rules, the Prosecution submits that the Proposed Facts meet the criteria which must be satisfied in order for a fact to be judicially noticed. In particular, the Prosecution argues that the Proposed Facts: (a) are relevant to the case the Prosecution must prove, (b) are distinct, concrete and identifiable, (c) represent the Galić

[1] Trial Hearing, 12 February 2007, T. 1891-1935.

Chambers' factual findings, (d) are in the same or substantially similar form as expressed in the *Galić* Trial Judgement and *Galić* Appeal Judgement, (e) are not subject to pending appeal or review and (f) do not attest to the criminal responsibility of the Accused.[3]

6. The Prosecution further submits that taking judicial notice of the Proposed Facts will serve the interests of justice by allowing the Prosecution to forego the introduction of unnecessary evidence, thus making the trial more efficient and expeditious.[4] The Prosecution argues that the right of the Accused to a fair trial will not be prejudiced, since the Proposed Facts must fulfil strict criteria before they can be noticed and the Defence has the opportunity to challenge a noticed fact at trial.[5]

7. In its Response, the Defence submits that Proposed Facts 1 to 53 concern the general context of the conflict with respect to the acts allegedly committed by the Accused[6] and defers to the Trial Chamber's decision with regard to these Proposed Facts.[7]

8. The Defence, however, objects to the judicial notice of Proposed Facts 54 and 55, alleging that these are not facts but rather definitions of concepts contained in the Indictment.[8] The Defence also opposes the judicial notice of Proposed Facts 56 to 181, arguing that facts 57 to 181 occurred outside the time covered by the Indictment, are not relevant to matters at issue in the current proceedings and are solely relevant to the criminal responsibility of Mr. Galić and not that of the Accused.[9] The Defence provides no basis for opposing Proposed Fact 56.

9. In its Reply, the Prosecution argues that Proposed Facts 54 and 55 only contain relevant factual findings rendered in the *Galić* Trial Judgement.[10] During oral submissions, however, the Prosecution abandoned its request for judicial notice of these two facts.[11]

10. The Prosecution further contends in its Reply that Proposed Facts 57 to 181 relate to matters at issue in the current proceedings, in that they go to establishing that the Accused was on notice, had knowledge of, and, in fact, inherited and continued a campaign of shelling and sniping by the Sarajevo Romanija Corps ("SRK") against civilians in Sarajevo between September 1992 and August 1994.[12] Specifically, the Prosecution argues that these Proposed Facts – albeit outside the

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[2] Trial Hearing, 14 Mars 2007, T. 3707.
[3] Motion, paras 8 – 13.
[4] Motion, paras 2, 14 – 16.
[5] Motion, paras 17 – 18.
[6] Response, para. 8.
[7] Response, p. 3. While the Defence here states that it takes no position with regard to Proposed Facts 1 to 54, the Trial Chamber notes the Defence's submission that it does object to Proposed Fact 54 (para. 11). The Trial Chamber will interpret the Defence submission as being that it takes no position only with respect to Proposed Facts 1 to 53.
[8] Response, para. 11.
[9] Response, paras 8 – 10.
[10] Reply, para. 6.
[11] Trial Hearing, 12 February 2007, T. 1927.
[12] Reply, paras 8 – 9.

Indictment period – go to proving Paragraph 19 of the Amended Indictment,[13] which alleges that the Accused implemented and/or furthered a campaign of sniping and shelling of civilians and knew of such a campaign as early as May 1992.[14]

11. The Prosecution argues, however, that, while relevant for establishing notice and knowledge, Proposed Facts 57 to 181 do not "attest, directly or indirectly, to the criminal responsibility of the Accused, nor to the Accused's acts, conduct or mental state."[15] The Prosecution refers to the *Karemera* Appeal Decision,[16] which it claims prohibits judicial notice only of those facts which go to the acts and conduct of the accused.[17] The Prosecution argues that none of the Proposed Facts 57 to 181 relates to the acts, conduct or mental state of the Accused and that they are thus suitable for judicial notice.[18]

B. Oral Submissions

12. During a hearing of 12 February 2007, the Parties made oral submissions in response to questions posed by the Trial Chamber regarding judicial notice of adjudicated facts. These questions focused on two main issues: (1) how the Parties distinguish between a *factual* finding and a finding of an *essentially legal* nature and (2) in cases where the Proposed Facts do not go to the acts, conduct or mental state of the Accused, whether the facts should nonetheless be excluded, following the *Karemera* Appeal Decision, if they do not advance Rule 94(B)'s objective of achieving expediency without compromising the rights of the accused, particularly the right to cross-examine.[19]

13. The Prosecution responded to the first question by arguing that the *Karemera* Appeal Decision clearly differentiates between a factual finding and an essentially legal conclusion.[20] According to the Prosecution, a factual finding is one that may contain legal terms but nonetheless describes a factual situation, allowing the legal term to be re-characterised using other words. The Prosecution submitted that a legal conclusion, in contrast, is "purely a legal finding" which can not be described factually in any other way.[21] The Prosecution argued that the *Karemera* Appeals Decision establishes that the category of essentially legal characterisations is rather narrow.[22]

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[13] Amended Indictment, 18 December 2006, para. 19.
[14] Reply, para. 8.
[15] Reply, para. 10.
[16] *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Appeal Decision").
[17] Reply, para. 10.
[18] Reply, para. 10.
[19] Trial Hearing, 12 February 2007, T. 1891.
[20] Trial Hearing, 12 February 2007, T. 1897.
[21] Trial Hearing, 12 February 2007, T. 1900.
[22] Trial Hearing, 12 February 2007, T. 1907, T. 1908.

14. In supporting this submission, the Prosecution gave examples of facts which the Appeals Chamber in *Karemera* deemed suitable for judicial notice. Specifically, the Prosecution cited facts containing the characterisations "widespread or systematic attacks",[23] "serious bodily or mental harm",[24] "armed conflict not of an international character"[25] and "genocide".[26] The Prosecution claimed that, by taking judicial notice of these facts, the *Karemera* Appeal Decision had the effect of ruling that they were "factual characterisations and not essentially legal characterisations."[27]

15. The Prosecution submitted that the Proposed Facts are similar to those deemed suitable for judicial notice in the *Karemera* Appeal Decision.[28] Further, the Prosecution argued that, while some of the Proposed Facts contain legal terms, they all describe factual situations.[29]

16. The Defence submitted that terms such as "civilians", "indiscriminate attacks" and "legitimacy of targets" constitute legal matters rather than factual ones and that judicial notice of Proposed Facts containing these terms would prejudice the rights of the Accused.[30] The Defence, however, offered no criteria for distinguishing between a factual finding and an essentially legal one.

17. To the second question, the Prosecution first responded that facts which do not go to the acts, conduct or mental state of the accused should be judicially noticed, following the *Karemera* Appeal Decision. The Prosecution argued that the balance between the rights of the accused—in particular the right to cross-examine—and the purpose of Rule 94(B) was struck by the *Karemera* Appeal decision's holding that facts proposed for judicial notice should not go to the acts, conduct or mental state of the accused.[31]

18. Secondly, the Prosecution alleged that the fact that the Defence took the position that the Proposed Facts are irrelevant indicates that there is no danger to the rights of the Accused, including the right to cross-examine.[32]

19. Thirdly, the Prosecution submitted that the rights of the Accused are not prejudiced because the Proposed Facts, although relevant to the Prosecution's case, are not crime-based facts. Rather than going to the crime-base of the crimes charged in the Indictment, they are one step further away, going to the crimes committed by Galić.

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[23] Trial Hearing, 12 February 2007, T. 1897, referring to *Karemera* Appeal Decision, para. 26.
[24] Trial Hearing, 12 February 2007, T. 1897, referring to *Karemera* Appeal Decision, para. 26.
[25] Trial Hearing, 12 February 2007, T. 1898, referring to *Karemera* Appeal Decision, para. 26.
[26] Trial Hearing, 12 February 2007, T. 1898, referring to *Karemera* Appeal Decision, para. 33.
[27] Trial Hearing, 12 February 2007, T. 1898.
[28] Trial Hearing, 12 February 2007, T. 1904, T. 1909, T. 1910.
[29] Trial Hearing, 12 February 2007, T. 1905, T. 1906, T. 1910.
[30] Trial Hearing, 12 February 2007, T. 1928.
[31] Trial Hearing, 12 February 2007, T. 1910, T. 1912, T. 1914.
[32] Trial Hearing, 12 February 2007, T. 1914.

20. Lastly, the Prosecution further contended that the Proposed Facts go directly to the guilt of Galić. In this regard, the Prosecution submitted that the Proposed Facts were tested and found by the Trial and Appeals Chamber in the course of the Galić proceedings, where it was in Galić's interest to rebut these facts and where he was given the opportunity to do so. The Prosecution argued that not admitting these facts would render Rule 94(B) a dead letter. [33]

21. The Defence argued that, although the formal conditions for the application of Rule 94(B) have been met, the Proposed Facts are not relevant and are not helpful to the proceedings. The Defence was of the view that judicially noticing the Proposed Facts could infringe upon the rights of the Accused, stating that the objective of expeditiousness of Rule 94(B) only applies under the condition that the right of the accused to a fair trial is not prejudiced. The Defence also argued that the Prosecution's submissions were inconsistent and that the Prosecution "here proposed a twisted application [...] of the relevant jurisprudence."[34]

III. APPLICABLE LAW

22. Judicial notice of facts is governed by Rule 94 of the Rules, which provides as follows:

> (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof;
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> (B) At the request of the party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of the adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings;

23. Rule 94(A) of the Rules concerns facts of common knowledge, while Rule 94(B) of the Rules allows a Trial Chamber to take judicial notice of relevant facts adjudicated in a previous trial or appeal judgement ("original judgement"), after having heard the parties, even if a party objects to the taking of judicial notice of a particular fact.[35] The basis upon which judicial notice is taken, pursuant to Rule 94(A) of the Rules, is that the fact is notorious.[36] In deeming a fact to be notorious,

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[33] Trial Hearing, 12 February 2007, T. 1915-1917.
[34] Trial Hearing, 12 February 2007, T. 1928-1929.
[35] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94(B), 8 May 2001 ("*Kupreškić et al.* Appeal Decision"), para. 6; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("*Popović et al.* Decision"), para. 3; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003 ("*Blagojević and Jokić* Decision"), para. 16.
[36] *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 (*Momir Nikolić* Appeal Decision"), para. 10; *Prosecutor v. Slobodan Milošević*, 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 ("*Slobodan Milošević* Appeal Decision"), pp. 3-4.

a Trial Chamber likewise determines that the matter is not the subject of reasonable dispute[37] and, as a result, the fact cannot normally be challenged during trial.[38] Conversely, pursuant to Rule 94(B) of the Rules, the basis upon which judicial notice is taken is that the fact is the subject of adjudication by another Chamber.[39] Consequently, while Rule 94(B) of the Rules confers a discretionary power on the Trial Chamber to determine whether or not to take judicial notice of a fact[40] and allows for the challenging of this fact during trial, it is mandatory for the Trial Chamber to take notice of a fact of common knowledge under Rule 94 (A), and the consequence is that it cannot be challenged.[41]

24. With regard to the Agreed Facts, Rule 65 *ter* (H) provides that "[t]he pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact", Rule 65 *ter* (M) provides that "[t]he Trial Chamber may *proprio motu* exercise any of the functions of the pre-trial Judge" and Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value".

IV. DISCUSSION AND FINDINGS

25. In the instant case, the Prosecution has made no submission that the Proposed Facts are notorious or that they should be judicially noticed pursuant to Rule 94(A).[42] The Trial Chamber must, however, determine whether the facts are admissible under rule 94(A), because it is mandatory for a Trial Chamber to take notice of a notorious fact, irrespective of any application by any party. Further, the Trial Chamber notes that the standard of notoriety is particularly rigorous; in the *Karemera* case, the Appeals Chamber relied on a variety of sources confirmed by numerous unanimous decisions of the Tribunal.[43] The Trial Chamber notes that the Prosecution has made no

[37] *Momir Nikolić* Appeal Decision, para. 10; *Prosecutor v. Blagoje Simić et al.*, IT-95-9-PT, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999, pp. 4-5.
[38] *Momir Nikolić* Appeal Decision, para. 10; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Prosecution's Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, 28 February 2003 ("*Krajišnik* February 2003 Decision"), para. 16.
[39] *Slobodan Milošević* Appeal Decision, p. 4; *Kupreškić et al.* Appeal Decision, para. 6.
[40] *Karemera* Appeal Decision, para. 41; *Slobodan Milosević* Appeal Decision, pp. 3-4; *Popović et al.* Decision, para. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 March 2006 ("*Prlić et al* Pre-Trial Decision"), para. 9.
[41] *Karemera* Appeal Decision, para. 41; *Momir Nikolić* Appeal Decision, para. 11; *Slobodan Milošević* Appeal Decision, p. 4; *Krajišnik* February 2003 Decision, para. 16.
[42] *See* Hearing, T. 1903-1904 where the Prosecution stated that the basis upon which it sought judicial notice was that the Proposed Facts had been adjudicated in past proceedings, not that they were facts of common knowledge.
[43] *See for example Karemera* Appeal Decision, para. 35 where the Appeals Chamber relies on the fact that: "Trial and Appeal Judgements [. . .] have unanimously and decisively confirmed the occurrence of genocide in Rwanda, which has also been documented by countless books, scholarly articles, media reports, U.N. reports and resolutions, national court decisions, and government and NGO reports."

submission that these conditions exist with respect to the Proposed Facts, and holds that they do not exist.

26. Therefore, the Trial Chamber now turns to consider whether the facts are judicially noticeable under Rule 94(B).

27. Several criteria may be derived from the Tribunal's case-law to determine whether to exercise discretion to take judicial notice of a proposed adjudicated fact.[44] The Appeals Chamber has held that:

(i) The fact must have some relevance to an issue in the current proceedings;[45]

(ii) The fact must be finalised, meaning that it is not subject to pending appeal or review;[46]

(iii) The fact must not be "related to the acts, conduct, or mental state" of an accused;[47]

(iv) The fact must not be unclear or misleading in the context in which it is placed in the moving party's motion;[48]

(v) The fact must be identified with adequate precision by the moving party.[49]

Trial Chambers have considered the following criteria in the exercise of the Chamber's discretion to judicially notice adjudicated facts:

(i) The fact must be distinct, concrete, and identifiable in the findings of the original judgement.[50] In making such a determination, the Trial Chamber must consider the proposed fact in the context of the original judgement, with specific reference to the place referred to in the judgement and to the indictment period of that case;[51]

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[44] *Popović et al.* Decision, para. 4; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005 ("*Krajišnik* Decision on Third and Fourth Motions"), para. 14; *Blagojević and Jokić* Trial Decision, para. 16; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 10 April 2003 ("*Slobodan Milošević* April 2003 Trial Decision"), p. 4; *Krajišnik* February 2003 Decision, para. 15.

[45] *Momir Nikolić* Appeal Decision, para. 11; *Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 189; *Prosecutor v. Eliézer 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; *Popović et al.* Decision, para. 5; *Krajišnik* Decision on Third and Fourth Motions, para. 17.

[46] *Kupreškić et al.* Appeal Decision, para. 6; *Popović et al.* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, paras 12, 15; *Krajišnik* Decision on Third and Fourth Motions, para. 14.

[47] *Karemera* Appeal Decision, paras 50-53 (quotation at para. 53); *Popović et al.* Decision, para. 12.

[48] *Karemera* Appeal Decision, para. 55; *Popović et al.* Decision, para. 8.

[49] *Momir Nikolić* Appeal Decision, paras 47, 56; *Kupreškić et al.* Appeal Decision, para. 12; *Popović et al.* Decision, para. 9; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B), 10 December 2004, para. 13.

[50] *Prlić et al* Pre-Trial Decision, para. 12; *Popović et al.* Decision, para. 6; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. 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, 14 April 2005, p. 5; *Blagojević and Jokić* Decision, para. 16; *Krajišnik* Decision on Third and Fourth Motions, para. 14; *Krajišnik* February 2003 Trial Decision, para. 15.

[51] *Krajišnik* Decision on Third and Fourth Motions, para. 14, fn. 44.

(ii) The fact, as formulated by the moving party, must not differ in any significant way from the formulation in the original judgement.[52] The Trial Chamber does not, however, endorse the notion that the formulation must be reproduced exactly;

(iii) The fact must be adjudicated, meaning that it is not based on a plea agreement or on facts voluntarily admitted in a previous case. The fact must have been the subject of adjudication rather than an agreement between parties in previous proceedings;[53]

(iv) The fact must represent the *factual findings* of a Trial Chamber or Appeals Chamber. It must not, therefore, contain any findings or characterisations that are of an essentially legal nature;[54]

28. In determining whether to exercise its discretion to take judicial notice of a proposed adjudicated fact, the Trial Chamber must also consider whether doing so would serve the interests of justice.[55] In this respect, a Trial Chamber is guided primarily by the need to ensure that the proceedings are both fair and expeditious and that the rights of the accused are preserved, as enshrined in Articles 20 and 21 of the Statute of the Tribunal ("Statute").[56] As the *Krajišnik* Trial Chamber emphasised, the "first concern is always to ensure that the Accused is offered a *fair trial*. As long as this principle is accomplished, the Chamber is under a duty to avoid that unnecessary time and resources are wasted on unnecessary disputes."[57]

29. In this respect, a key consideration is whether taking judicial notice of a fact pursuant to Rule 94(B) of the Rules will advance judicial economy while still safeguarding the rights of an accused. Judicially noticing a fact can enhance judicial economy by avoiding the rehearing of allegations already proven in past proceedings, thereby shortening the duration of the trial. However, judicially noticing a fact has the legal effect of establishing a "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";[58] judicial notice, therefore, shifts the burden of

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[52] *Popović* Decision, para. 7; *Blagojević and Jokić* Decision, para. 16; *Krajišnik* Decision on Third and Fourth Motions, para. 14.

[53] *Popović et al.* Decision, para. 11; *Krajišnik* Decision on Third and Fourth Motions, para. 14; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B), 1 April 2004, p. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003 ("*Slobodan Milošević* April 2003 Trial Decision"), p. 3; *Krajišnik* February 2003 Trial Decision, para. 15.

[54] The phrase "essentially legal" stems from the *Krajišnik* Decision on Third and Fourth Motions, para. 15. *See also Popović et al.* Decision, para. 11; *Prlić et al.* Pre-Trial Decision, para. 12; *Blagojević and Jokić* Trial Decision, para. 16; *Slobodan Milošević* April 2003 Trial Decision, p. 3; *Krajišnik* February 2003 Trial Decision, para. 15; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-PT, Decision of 25 March 1999, p. 3.

[55] *See, e.g., Popović et al.* Decision, para. 4; *Prlić et al.* Pre-Trial Decision, para. *Krajišnik* Decision on Third and Fourth Motions, para. 12.

[56] *Karemera* Appeal Decision, para. 41; *Momir Nikolić* Appeal Decision, para. 12; *Popović et al.* Decision, para. 16; *Krajišnik* February 2003 Decision, para. 15.

[57] *Krajišnik* February 2003 Decision, para. 11.

[58] *Momir Nikolić* Appeal Decision, para. 11, *quoting Slobodan Milošević* Appeal Decision, p. 4.

production of evidence to the accused such that, if the Defence does not rebut the adjudicated fact, the Chamber is entitled to presume the adjudicated fact to be accurate.[59] However, adjudicated facts which are judicially noticed pursuant to Rule 94(B) of the Rules remain to be assessed in light of all the evidence brought at trial to determine what conclusions, if any, can be drawn from them and what weight should be attributed to them.[60] Further, it is important to recall that, while the initial burden of producing evidence is shifted to the accused, the burden of proof beyond a reasonable doubt remains on the Prosecution.[61]

30. The Appeals Chamber's decision in *Karemera* explicitly permits the taking of judicial notice of facts relating directly or indirectly to the defendant's guilt, provided they do not go specifically to the acts, conduct or mental state of the accused.[62] However, if the Proposed Facts do not go to the acts, conduct or mental state of the accused, the Trial Chamber must still assess whether under the circumstances of the case admitting them will advance Rule 94 (B)'s objective of expediency without compromising the rights of the accused.[63]

31. The Trial Chamber is of the view that the Prosecution's submission with regard to the balance struck by the *Karemera* Appeal Decision[64] between the purpose of Rule 94(B) and the rights of the Accused does not fully reflect the substance of that Decision. The *Karemera* Decision did hold, as argued by the Prosecution, that facts going to the acts, conduct or mental state of the accused cannot be noticed. However, it also held—and this was omitted in the Prosecution submissions—that, regarding facts which do not, "it is for the Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it—and thus shifting the burden of producing evidence rebutting it to the accused—is consistent with the accused's rights under the circumstances of the case. This includes [...] facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability."[65]

32. The Trial Chamber is satisfied that none of the Proposed Facts go to the acts, conduct or mental state of the Accused. However, following the *Karemera* Appeals Decision, it must still assess whether taking judicial notice of them would be consistent with the rights of the accused, particularly the right to examine witnesses against him, as enshrined in Article 21(4)(e) of the Statute. The Trial Chamber is of the view that this right is particularly important with regard to

[59] *Karemera* Appeal Decision, para. 42; *Popović et al.* Decision, para. 21; *Krajišnik* February 2003 Decision, para. 16.
[60] *Popović et al.* Decision, para. 21, citing *Krajišnik* March 2005 Trial Decision, para. 17, *Accord Prlić et al.* Pre-Trial Decision, para. 11; *See also Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, p. 3-4.
[61] *Karemera* Appeal Decision, para. 49; *Popović et al.* Decision, para. 21; *Krajišnik* February 2003 Decision, para. 16.
[62] *Karemera* Appeal Decision, para. 50.
[63] *Karemera* Appeal Decision, para. 53.
[64] See surpa para. 15.

Proposed Facts which go to crimes committed under the command of Galić, the Accused's predecessor, and which, as acknowledged by the Prosecution, have a strong link with the crimes charged in the indictment, particularly those facts which may in effect put the Accused on notice.[66] The Trial Chamber considers that shifting the burden to produce evidence to the Accused, and thereby obliging him to rebut them, would not be consistent with his rights. Regardless of whether or not the Defence considers these Proposed Facts relevant to this case, it remains the duty of the Trial Chamber to safeguard the rights of the Accused.

33. Further, the Trial Chamber recalls that the purpose of Rule 94(B) is to enable a Trial Chamber to take judicial notice of *factual* findings. Judicial notice pursuant to Rule 94(B) is not designed for the importing of legal conclusions from past proceedings. In determining whether a proposed fact is truly a factual finding, the *Krajišnik* Trial Chamber observed that "many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on a case-by-case basis whether the proposed fact contains findings or characterizations which are of an essentially legal nature and which must, therefore, be excluded."[67]

34. The Trial Chamber notes the Prosecution's submission that an essentially legal finding or characterisation is one that can not be described factually in any other way, whereas a factual finding is one that may contain legal terms but nonetheless describes a factual situation, allowing the legal term to be re-characterised using other words.[68] As outlined above, the Prosecution relied extensively on examples of facts deemed suitable for judicial notice in the *Karemera* Appeal Decision in supporting this submission.[69]

35. The Trial Chamber considers the Prosecution's submission in this respect to be flawed. The facts from the *Karemera* Appeals Decision to which the Prosecution refers were judicially noticed pursuant to Rule 94(A) rather than Rule 94(B) of the Rules. Under Rule 94(A), a Chamber must satisfy itself *only* that the fact is notorious and beyond reasonable dispute.[70] Upon making this finding, the Chamber is *bound* to take judicial notice of the fact and can not consider any other criteria.[71] Indeed, in discussing the submission that the term "genocide" is a legal characterisation,

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[65] *Karemera* Appeal Decision, para. 52.
[66] See supra para. 8 the Prosecution's submission on the relevance of the crimes committed under *Galić* to the present case.
[67] *Krajisnik* Decision on Third and Fourth Motions, para. 19.
[68] Hearing, T. 1900; *see supra* para. 16.
[69] Hearing, T. 1897-1898, 1907-1908.
[70] *Karemera* Appeal Decision, para. 22; *Momir Nikolić* Appeal Decision, para. 10; *Slobodan Milošević* Appeal Decision, pp. 3-4.
[71] *Karemera* Appeal Decision, paras 22, 23; *Momir Nikolić* Appeal Decision, para. 10; *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 14; *Slobodan Milošević* Appeal Decision, pp. 3-4.

the Appeals Chamber in *Karemera* ruled that it could not even consider the submission, as "Rule 94(A) does not provide the Trial Chamber with discretion to refuse judicial notice on this basis."[72]

36. Thus, the Trial Chamber observes that in no part of its Decision in *Karemera* did the Appeals Chamber hold that the facts it deemed suitable for judicial notice did not contain essentially legal conclusions or characterisations; it simply ruled that these facts were notorious. The Prosecution submission relies extensively on an erroneous comparison with these facts. It is not necessary for the Trial Chamber to determine the scope of the category of essentially legal conclusions, that is, whether it is narrow or broad. It is sufficient to point out that, in arriving at its conclusion as to the narrowness of that category, the Prosecution relied on a flawed interpretation of the *Karemera* Appeals Decision.

37. With regard to the Catalogue of Agreed Facts, the Trial Chamber finds that the recording of points of agreement between the parties at the trial stage results in the acceptance of those agreed points as evidence pursuant to Rule 89 (C).[73]

V. DISPOSITION

The Trial Chamber understands rule 94(B) as giving a Trial Chamber a discretionary power to admit adjudicated facts when it advances the expeditiousness of the proceedings and is in the interests of justice. Accordingly, the Trial Chamber will identify, in light of the foregoing analysis, those facts which it admits, leaving aside those which it rejects.

PURSUANT TO Rules 126 *bis*, 94 (B), 65 *ter* (H), 65 *ter* (M) and 89 (C) of the Rules

HEREBY GRANTS IN PART the Motion and decides as follows:

(a) The Trial Chamber grants leave to the Prosecution to file the Reply;

(b) The Trial Chamber takes judicial notice of the following Proposed Facts:

1-53, 56, 60, 64-71, 73-76, 81-85, 88, 90-93, 99-104, 108-110, 112-116, 122, 123, 125-130, 143, 147, 156, 158, 159 and 161-164, admitted unanimously; facts 62 and 176 are admitted by majority, Judge Robinson dissenting;

(c) The Trial Chamber admits into evidence the list of Agreed Facts.

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[72] *Karemera* Appeal Decision, para. 37.
[73] *See Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Motion Concerning Further Agreed Facts, 25 July 2005, p. 2.

Done in English and French, the English version being authoritative.

Judge Patrick Robinson
Presiding

Dated this tenth day of April 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

I. DISSENTING OPINION OF JUDGE HARHOFF

1. Taking "judicial notice" of facts adjudicated in other trials before this Tribunal appears to be a fundamentally flawed idea because of the very nature of judicial litigation. If a certain fact has been the subject of a reasonable dispute at trial, and if it was ultimately adjudicated by a Chamber, this very circumstance would seem to suggest that the fact in question was not and could not have been an indisputable fact of so-called "common knowledge" – like the facts contemplated in Rule 94 (A) of the Tribunal's Rules of Procedure and Evidence. Had the fact in question been of common knowledge, there would have been no reason to dispute it at trial. Taking "judicial notice" of facts which have been litigated in earlier proceedings may, depending on the context, affect the presumption of innocence of the Accused.

2. In this trial, the Prosecution has requested the Chamber to take "judicial notice" of 181 facts adjudicated in the Galić case, *viz.* the Trial Chamber's judgement of 5th December 2003 and the Appeals Chamber's judgement of 30th November 2006. The first 53 of these facts relate to the history and background of the armed conflict and do not pose any problem with regard to the presumption of innocence. Two facts have been dropped by the Prosecution and the Chamber has decided, in the present Decision, to take "judicial notice" of another 57 facts.

3. In its Decision, thus, the Trial Chamber has taken judicial notice of altogether 110 of the proposed adjudicated facts under Rule 94 (B) and has partly rejected the Prosecution's interpretation of the Appeals Chamber's Decision of 16th June 2006 in *Karemera et al.* I fully support these findings of the Trial Chamber and the reasons behind them.

4. However, I respectfully disagree with the majority's decision to decline from accepting judicial notice of the remaining 69 proposed adjudicated facts. All of these remaining facts relate to the factual situation or to particular incidents occurring in Sarajevo during General Galić's time in power, and they all imply somehow that the SRK – under Galić – deliberately and indiscriminately targeted civilians or civilian objects in Sarajevo. In this opinion, I shall try to set out my reasons for departing from the majority's views.

5. As reflected in the Tribunal's judicial practice, there are indeed valid and acceptable reasons for relying, under certain conditions, on facts which have been adjudicated in other proceedings before this Tribunal. All the trials here, notably, deal with inter-related conflicts unfolding within a limited geographical space during a limited time-span, and it is therefore only natural, as the proceedings have developed, that certain factual findings made by the Tribunal's Chambers in previous trials are assumed by Chambers in subsequent trials without having to establish, once again, the veracity of these findings. The justification for this assumption lies not only in the quest for judicial economy, as frequently adduced in the Tribunal's Decisions on judicial notice, but also

in the need to spare our crime-base witnesses from having to relive their traumas once more by returning to the Tribunal to offer their testimony over and over again. Rule 94, in this respect, shares the same purpose as Rules 92 *bis* and *ter,* but Rule 94 goes further in that it allows for accepting the adjudicated fact without requiring submission of any further evidence in proof thereof. In this respect, judicial notice of adjudicated also relieves the Trial Chamber from having to review evidence relating to facts which have already been considered and established by previous Chambers.

6. From the point of view of criminal law, however, the Tribunal's practice of taking "judicial notice" of adjudicated facts appears to run contrary to the presumption of innocence of the Accused, mainly because it places an onus of proof on the latter and prevents him or her from cross-examining the witnesses who previously bore testimony to the facts which are now being judicially noticed in his or her trial. This, obviously, represents a disadvantage to any defendant.

7. In many or most of the Tribunal's recent decisions, however, Trial Chambers as well as the Appeals Chamber have sought to remedy this deficiency, at least partially, by asserting that previously adjudicated facts are only admitted into evidence in the new trial as "rebuttable presumptions", so as to allow the defendant to challenge the adjudicated facts at trial. The impact of this notion, in other words, is that the new Trial Chamber or the Appeals Chamber is not compelled to rely unconditionally on such facts – as it would have been if the fact in question were truly a fact of common knowledge. This, to be sure, does place an onus of proof upon the Accused in the sense that he or she then has to prove that the adjudicated fact is unsafe.

8. In the end, thus, the onus to adduce evidence will have shifted from the Prosecution to the Accused, and this is what constitutes the controversial and highly sensitive aspect of taking "judicial notice" of adjudicated facts. In the present Decision, the Trial Chamber does not claim that judicial notice directly establishes a "burden of proof" on the Accused, but rather that judicial notice of adjudicated facts partly *shifts* the burden of proof to the Accused, who now has to actively submit evidence to rebut the adjudicated fact.

9. There is another inherent problem arising out of the Tribunal's practice in respect of adjudicated facts, namely that of showing a viable distinction between truly factual findings on the one hand, and facts which are of an essentially legal nature on the other. This problem becomes apparent when one looks at the facts proposed by the Prosecution; when the Galić judgement establishes, for instance, that "*civilians* were targeted in Novo Sarajevo between September 1992 and August 1994 from the SRK-controlled area of Grbavica" (see proposed fact nr. 77; italics added), then it is open to interpretation whether the term "civilians" refers to persons specifically protected by International Humanitarian Law – thus being a legal finding within the meaning of International Humanitarian Law – or merely establishes that the status of the victims was that they

were *de facto* civilian in the sense that they were not members of the armed forces or in any way affiliated to these, in which case the adjudicated fact appears to be a purely factual finding. In the Tribunal's practice, it has been established that adjudicated facts cannot be judicially noticed if they are of "an essentially legal nature", but this qualification is still unclear as it offers no guidance as to whether the concept of "a civilian" is of a purely factual or an essentially legal nature. It all depends on the context and is therefore subject to the Trial Chamber's discretion.

10. The Accused – in his capacity as commander of the Sarajevo Romanija Corps (the SRK) – is charged in the Indictment with having carried on and continuously conducted a campaign of terror against the civilian population in the City of Sarajevo when he took power over the SRK after General Galić in August 1994. While the latter was in power from 1992 to August 1994, however, the Accused served as Chief of Staff directly under general Galić from July 1993 – more than a year before he himself became commander of the SRK after Galić. This fact is agreed upon by the Parties.

11. If this Trial Chamber were to admit adjudications in Galić regarding the deliberate and indiscriminate sniping and shelling, by forces under Galić's command, on civilian persons and civilian objects in Sarajevo, one might easily infer from such facts that the Accused in the present trial *was put on notice* that these crimes were being committed under the authority of his predecessor. He must have known that this was going on and should have taken steps to prevent these crimes and punish the perpetrators – at least from the time when he himself took power.

12. This inference may not in itself have any direct bearing on the responsibility of the Accused for the particular crimes charged in the Indictment against him, but it might suggest that the Accused would then have to prove that he was *not* put on notice and had no knowledge of the deliberate targeting of civilians in Sarajevo. In this respect, the issue of the Accused being put on notice indirectly points to the mode of his liability as alleged by the Prosecution, either directly under Article 7.1 of the Statute or as command responsibility under Article 7.3. Admitting such facts, in other words, would seem to be prejudicial to the rights of the Accused.

13. This concern, however, is misperceived because it is still for the Prosecutor to prove that the Accused was in fact put on notice about the crimes. Although it may seem very likely that the Accused knew about the campaign of terror under Galić, the Prosecution still has to prove beyond a reasonable doubt that the Accused knew of the campaign and also, according to the Indictment, that he himself intended to support and continue this campaign and failed to take the necessary measures to prevent the sniping of civilians and the shelling of civilian objects and/or to punish the perpetrators.

14. There is, undoubtedly, a procedural advantage for the Prosecution in this, but it does on the other hand appear somewhat artificial if the Chamber were to completely disregard the facts

established in *Galić* and require the Prosecution to prove it all again. The Chamber, in my view, must be afforded the freedom of being able to take into consideration the *context* in which the Accused held command of the SRK during his time in power and the *circumstances* under which he assumed and exercised control of the Serbian forces around Sarajevo. It should be recalled, in this regard, that the Chamber already enjoys a large degree of discretion under Rule 89 (C) and (D) to attach whatever probative value to the evidence before it which it deems to be appropriate. Taking "judicial notice" of facts adjudicated in Galić does not, in other words, compel the Chamber to rely unconditionally on these facts, even if the defence does not raise any challenge against them. The Chamber will still require proof beyond a reasonable doubt that the Accused had knowledge of the campaign and committed himself to its extension and failed to prevent the crimes and punish the perpetrators.

15. For this same reason, in my view, the taking of "judicial notice" of the remaining facts in this case does not impair *the interests of justice*. Even if the Chamber were to require the Prosecution to prove that the SRK deliberately and indiscriminately targeted civilians in Sarajevo under Galić's command, the Accused would still have to seek evidence to rebut the Prosecution's allegation that he was indeed put on notice. The Chamber is tasked to strike a reasonable balance between judicial economy, expeditiousness and concerns for the witnesses on the one hand, and the rights of the Accused on the other, but this balance is not overthrown by taking "judicial notice" of facts relating to crimes committed outside the scope of the Indictment by perpetrators outside his command. This aspect, in my view, is a strong argument in favour of taking judicial notice of all the proposed facts.

16. As far as the qualification of the facts is concerned, none of the proposed facts contain, as far as I can see, elements which are of an "essentially legal nature". Even if terms such as "civilians", indiscriminate attacks" and others do have legal importance in terms of International Humanitarian Law, the use of these terms in the present context and the proposed facts is exclusively to establish that the victims did not have any affiliation to the armed forces of the ABiH.

17. I am therefore of the opinion that the remaining 69 proposed adjudicated facts from Galić could have been admitted in this trial as "judicially noticed" facts.

Done in English and French, the English version being authoritative.

Judge Frederik Harhoff

Dated this tenth day of April 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

Annex A

Fact	Para(s).	Objections to Formulation of Proposed Adjudicated Facts – misleading omissions and misstatements, tendentious[1]
1.	169	The final line of paragraph 169 states: *On 18 June 1997, the RUF issued an official apology to the nation for its crimes and went on to praise Johnny Paul Koroma's government.* Objection: The omission is tendentious and misleading in that the omitted sentence also mentions the relationship between the two factions.
2.	171	Paragraph 170 discusses the high degree of cooperation between the two factions: "*Commanders of both factions attended coordination meetings at which they planned operations and organized joint efforts to obtain arms and ammunitions.*" Objection: Omitting this portion, which focuses on the relationship between the two factions and only including the paragraph that describes the negative aspect of this relationship is misleading and tendentious.
3.	1655	"Although the two groups were allied in one Government and worked *closely* together during the AFRC period, *the available evidence suggests* that individuals continued to identify themselves as either RUF or SLA and that at an organizational level, separate commanders for each group co-existed in the Districts." Objection: The Prosecution will assume that the omission of the word 'closely' was an unintended mistake but notes that the deviation presents the finding in a tendentious manner. The omission of the phrase "available evidence suggests" is objectionable as it clearly indicates that the finding is based on evidence before the AFRC Trial Chamber.
5.	175,176	The findings in paragraphs 175 and 176 of the AFRC Judgement are misstated in that the Defence states: "The retreat from Freetown, following the reinstatement of President Kabbah in March 1998, was uncoordinated and without any semblance of discipline." Objection: The AFRC Trial Chamber did not state that the retreat took place *following* the reinstatement of Kabbah. The characterization of the "retreat" as uncoordinated and without any semblance of military discipline is objectionable in that the Defence submission appears to characterize portions of the retreat in March 1998. However, the Trial Chamber was referring to the retreat up to Masiaka. Evidence before this Trial Chamber and previous findings in the AFRC case suggest that the retreat had already gone past Masiaka by March of 1998.
7.	185, 188	185. "Within three days of his arrival in Koidu Town, around 4 March 1998, Johnny Paul Koroma ("JPK") departed for Kailahun. *The majority of AFRC fighting forces remained in Kono District alongside the RUF troops. Although the AFRC were subordinate to the RUF,*

[1] Any discrepancy between the Defence's submission and the AFRC Trial Chamber's finding is noted in italics.

Fact	Para(s).	Objections to Formulation of Proposed Adjudicated Facts – misleading omissions and misstatements, tendentious[1]
		there was cooperation between them and the two factions planned and participated in joint operations." Objection: The AFRC Trial Chamber states that JPK *arrived* in Koidu around March 4, 1998 and departed three days later while the Defence states that JPK *departed* Koidu around March 4, 1998. The significance of the omitted language is discussed in paragraph 7 of the Prosecution's Response. 188. "When Johnny Paul Koroma departed for Kailahun District he was given to believe that he would be welcomed there by the RUF. However, when he arrived in Kailahun he encountered a hostile RUF leadership. He was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. *He was then stripped and searched for diamonds and his wife was sexually assaulted.* Bockarie placed Koroma under house arrest in Kagama village near Buedu where he remained until mid 1999. *No evidence was adduced suggesting* that Koroma had any form of contact whatsoever with any of his former associates during the remaining period covered by the Indictment." Objection: In this trial, such evidence was adduced.[2] Therefore, the actual wording of the AFRC Trial Chamber's finding is not inconsistent with current evidence, but adopting the Defence's suggested wording would be tantamount to having this Trial Chamber accept a finding that first, was never adopted in the previous trial and secondly, would be inconsistent with evidence in the current case.
8.	190, 379	"At a meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north-western area of Sierra Leone in preparation for attack on Freetown. The purpose was to restore the Sierra Leone army. *There is no evidence that* the RUF was involved in these deliberations." Objection: In the current case, evidence has been adduced about the RUF's role related to the initial set up and subsequent reinforcement in terms of manpower and communications to this referred to "blocking force."[3] The omission of this phrase means that the Trial Chamber is being asked to accept an unqualified "finding" which was not made in the AFRC Judgement and which would be inconsistent with evidence before this Chamber.

[2] See e.g. Isaac Mongor.
[3] See e.g. Perry Kamara.