743) SCSL-03-01-T (24360-24368) 24360

THE SPECIAL COURT FOR SIERRA LEONE

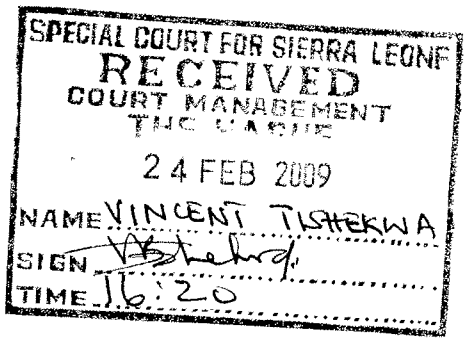
**Trial Chamber II**

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

**Registrar:** Mr. Herman von Hebel

**Date:** 24 February 2009

**Case No.:** SCSL-2003-01-T




**THE PROSECUTOR**

**–v–**

**CHARLES GHANKAY TAYLOR**

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PUBLIC

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

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## I. Introduction

1. On 19 February 2009, the Prosecution filed a *Response to the Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement Pursuant to Rule 94(B),* ("Response"), wherein it objected to the admission of all 15 adjudicated facts on the basis that the admission of the facts would be contrary to the interests of justice, would not promote judicial economy, and because the underlying criteria for taking judicial notice of adjudicated facts have not been met.[1]
2. The Prosecution's Response is without merit for the following reasons:
   a) The Response fails to acknowledge that the adjudicated facts are largely based on the testimony of its own evidence in the AFRC case;
   b) The Prosecution would not be unduly disadvantaged by the admission of the facts at this stage of the proceedings;
   c) The Prosecution seeks to put undue restrictions on the Trial Chamber's discretion; and
   d) The Prosecution's arguments are internally inconsistent.
3. In light of some of the Prosecution's objections, the Defence however specifies in paragraph 18 of this Reply, slight reformulations or amendments of Facts 1, 3, 5, 7 and 8 of the proposed adjudicated facts, should the Trial Chamber be inclined to consider them.

## II. Submissions

*The Prosecution is not disadvantaged by the admission of adjudicated facts*

4. The Prosecution incorrectly states that the adjudicated facts selected from the AFRC Judgement are "evidence of the Defence".[2] A perusal of the transcript and especially the transcript references in the AFRC Judgment however makes it very clear that the facts as adjudicated therein were based primarily on the testimony of Prosecution witnesses.[3] It is therefore curious that the Prosecution should find the evidence of its own witnesses in a

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-738, 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), 19 February 2009 ("**Response**").
[2] Response, para. 6.
[3] Fact 1: Exhibits P-61 and P-77; Fact 2: TF1-045, TF1-334, Gibril Massaquoi and George Johnson; Fact 3: Gibril Massaquoi; Fact 4: TF1-184 and Gibril Massaquoi; Fact 5: Exhibits P-36 and P-57, TF1-334, George Johnson and Col. Richard Iron; Fact 6: TF1-184, TF1-153 and George Johnson; Fact 7: TF1-334, TF1-045, TF1-153 and George Johnson; Fact 8: TF1-184, TF1-334 and George Johnson; Fact 9: TF1-334 and George Johnson; Fact 10: unspecified; Fact 11: George Johnson; Fact 12: TF1-334; Fact 13: unspecified; Fact 14: TF1-334 and George Johnson; Fact 15: Exhibit P-36 and Col. Richard Iron.

previous trial – some of whom were called to testify again in this trial – objectionable, even if the evidence in this trial is broader or more expansive. The Defence submits that there would be no harm to the Prosecution's case if the previous testimony of its witnesses, as adjudicated in the AFRC Judgement, were given a "presumption of accuracy" in this trial; unless of course, the Prosecution is now advancing a different account.

5. While admittedly, the Prosecution needs to tailor its case against a particular accused person before the court, one of the twin purposes of the doctrine of judicial notice is to create consistency of case law.[4] This and the other twin purpose – judicial economy – need only be balanced against the Accused's right to a fair trial.[5]
6. The Defence observes that none of the decisions cited by the Prosecution to support its argument on trial fairness and prejudice were made in the context of adjudicated facts.[6] Rather, the statements were made in relation to the admission of evidence during the Prosecution's own case, when the imperative that the Prosecution be treated fairly is of greater significance. In this instance, the Prosecution has had every opportunity to present evidence, both documentary and oral, and the admissibility of that evidence has been fairly determined. Thus, it is of no detriment to the Prosecution if the adjudicated facts are now admitted with a rebuttable presumption of accuracy.
7. At all times, the Prosecution must prove its case beyond a reasonable doubt. The standard of proof required to establish guilt beyond a reasonable doubt is obviously higher than the standard of proof required to challenge adjudicated facts that may be given a rebuttable presumption of accuracy.[7] The Prosecution concede that a certain volume of evidence has already been led in respect to the issues contained in the proposed adjudicated facts.[8] This evidence could be used to challenge any rebuttable presumption created. Therefore, the Prosecution is not prejudiced by the admission of these adjudicated facts even though it has essentially closed its case.

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[4] *Prosecutor v. Ntakirutimana,* ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 28 ("***Ntakirutimana* Decision**")
[5] Ibid.
[6] Response, para. 4.
[7] See Response, para. 12.
[8] Response, para. 13.

8. Furthermore, the admission of adjudicated facts at this stage does not require any mental somersault on the part of the Trial Chamber.[9] While the Prosecution has presented the bulk of its evidence, it is assumed that the Trial Chamber has not yet made a final determination on the accuracy, credibility, or reliability of the Prosecution evidence; the Defence case may impact its assessment in this regard. A presumption of accuracy for adjudicated facts is only one more factor to consider when weighing all the evidence at the conclusion of the case.
9. The Prosecution complains of the Defence "delay" in filing its application for adjudicated facts.[10] However, the Defence reiterates that Rule 94(B) imposes no restrictions as to which stage in the proceedings an adjudicated facts motion should be brought. To the degree that the stage in the proceedings is a discretionary factor against admission and some explanation is warranted, the Defence submits that these adjudicated facts will help form the basis of the Defence case; the Defence case has yet to begin. The Defence had initially hoped to wait and do a joint filing of adjudicated facts from the AFRC and RUF judgements, but as the RUF judgement and appeal filings were pushed further and further back, the Defence decided to go ahead with this application.
10. In regard to the stage of the proceedings, the Prosecution erroneously states that the *Hadzihasanovic* and *Ntakirutimana* cases do not assist the Defence.[11] In fact, in *Hadzihasanovic*, the Trial Chamber partially granted the Defence application and admitted 39 adjudicated facts, despite considering that both the Prosecution and Defence had finished presenting their cases (the rest of the facts were dismissed on other grounds).[12] Additionally, in *Ntakirutimana,* only one of seven proposed adjudicated facts was dismissed on the basis that taking judicial notice of the issue would not assist judicial economy.[13] Furthermore, in generally considering the issue the Trial Chamber decided that they were "not inclined to view judicial notice as significantly influencing judicial economy" because the case itself was short – only 27 trial days for the Prosecution case and one month scheduled for the Defence case.[14]

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[9] Response, para. 13.
[10] Response, para. 10.
[11] Response, para. 11.
[12] *Prosecutor v. Hadzihasanovic and Kubura,* IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005, 14 April 2005.
[13] *Ntakirutimana* Decision, para. 52
[14] Ibid, para. 31.

11. Consequently, because the Prosecution is not prejudiced by the admission of adjudicated facts which would establish a rebuttable presumption of accuracy for findings based on testimony of its own witnesses in another proceeding before this Tribunal, and because the stage of the proceedings would still allow the Prosecution to call rebuttal evidence and/or cross-examine Defence witnesses on these facts, the Trial Chamber should exercise its discretion in favour of the Defence application.

*The Prosecution's objections to centrality and relevance have no basis*

12. The Prosecution argues both that the proposed adjudicated facts go to issues central to the present case[15] and that some of the proposed adjudicated facts lack relevance.[16] Obviously, the proposed facts cannot be both "central" and "remotely connected" at the same time.
13. In reply to the substance of the objections, the Defence submits that there is no prohibition on the admission of 'central facts' through judicial notice, save that, that is discretionary. With respect to the relevance argument, the Defence submits that all of the facts objected to by the Prosecution are relevant to the relationship between or command structure of the AFRC and/or the RUF (Facts 6, 10, 11 and12), and the supply of arms/ammunition (Fact 9).
14. The relationship between the AFRC and the RUF, and any relationship between either of those organizations and the Accused is certainly central to this case. That is precisely why it makes judicial economy to admit previously adjudicated facts that go to some aspects of this issue, so that it does not have to be addressed to a great extent in the Defence case. In that event, the evidence already led by the Prosecution on this issue[17] could either be used to rebut the presumption of accuracy of the adjudicated facts or to fill in additional and contextual details. Even so, none of the proposed adjudicated facts discuss the relationship between either of the organizations and the accused.
15. To the extent this Defence team stands by the Agreed Facts of the previous Defence team, Agreed Fact 31, which states "[o]n about 6 January 1999, *inter alia*, RUF and AFRC forces attacked Freetown", that does not tie the Defence to any grand conclusion.[18] The admission is simply a factual recognition that there may have been RUF elements that participated in

[15] Response, paras. 7-9.
[16] Response, paras. 17.
[17] Response, paras. 7 and 8.
[18] See Response, para. 7, footnote 15.

the AFRC attack on Freetown.[19] It says nothing about what the RUF may have done as a cohesive organization, or about whether or not the RUF sent reinforcements to Waterloo or the Freetown environs in the days after the 6 January invasion, etc. Thus the proposed adjudicated facts from the AFRC Judgement are not in contradiction with this Agreed Fact.

*Reformulations or clarifications in light of Prosecution objections*

16. The Prosecution complains that the proposed adjudicated facts as stated mix principal and accessory facts.[20] The Defence disagrees that the mixed nature of these adjudicated facts and the fact that they are written in paragraphs makes them inappropriate for purposes of judicial notice. The facts are sufficiently clear, and the paragraph format allows the principal facts to be understood in context.

17. In relation to Fact 7, which does arguably contain a vague phrase, "the remaining period covered by the indictment", the Defence would not be opposed to amending it to clarify the date of the remaining period of the AFRC Indictment, which was January 2000. However, based on Prosecution objections set out below, the Defence agree to take out the last sentence of Fact 7 completely.

18. The Prosecution further complains that Facts 1, 2, 3, 5, 7, and 8 are formulated in a way that is misleading and tenditious.[21] The Defence disagrees that the proposed adjudicated facts are purposefully misleading or tenditious, but in light of the Prosecution's objections would amend some of the facts as follows, if the Trial Chamber deems it necessary.

   *a.* Fact 1 – Amend to include the final line of paragraph 169 of the AFRC Judgement, which 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."

   *b.* Fact 2 – Do not amend. Of course, there is evidence on record to show that the AFRC and RUF cooperated, but to what degree and on what basis, the Defence intend to challenge in its Defence case. It is a fact, however, that the AFRC and RUF relations deteriorated over time, and the specifics contained in Fact 2 are evidence of this split.

   *c.* Fact 3 – Amend to include the word "closely". There is no need to include the phrase "the available evidence suggests", as of course the fact is based on the evidence before

[19] See also, eg., cross-examination of TF1-371.
[20] Response, para. 16 (specifically referencing Facts 1, 5, 6, and 8).
[21] Response, para. 18 and Annex A.

the AFRC Trial Chamber. If there is evidence to the contrary on record in the Taylor case, that will be used to rebut the presumption of accuracy. Thus, Fact 3 may be amended to read: "The RUF and AFRC were allied in one Government and worked closely together during the AFRC period, but the individuals continued to identify themselves as either RUF or SLA and at an organizational level, separate commanders for each group co-existed in the Districts."

*d.* Fact 5 – Amend such that Fact 5 encompasses paragraphs 175 and 176 from the AFRC Judgement verbatim. However, if adopted verbatim, the Defence notes that the sentence "The government of former President Kabbah was reinstated in March 1998" would be included; this fact was judicially noted by the Trial Chamber in the AFRC Judgment and as such may not be a proper candidate for an adjudicated facts filing. Thus, the Defence leaves the inclusion of this sentence up to the Trial Chamber, requesting that the rest of the two paragraphs be judicially noted either way..

*e.* Fact 7 – Amend to strike the first sentence[22] and include the facts regarding the search for diamonds and the sexual assault on his wife. As noted above, further amend to strike the last sentence. Thus, Fact 7 should read: "When Johnny Paul Koroma departed for Kailahun District in 1998, he was given to believe 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."

*f.* Fact 8 – Amend to strike the last sentence.

## III. Conclusion

19. The Defence persists with its plea for the Trial Chamber to exercise its discretion to judicially note the 15 adjudicated facts from the AFRC Judgement. This will promote

[22] The Defence submit that both the Prosecution and Defence interpretation of "Within three days of his arrival in Koidu Town, around 4 March 1998, Johnny Paul Koroma ("JPK") departed for Kailahun" could be correct based on the context of paragraph 188 in the AFRC Trial Judgement. Because it is not clear whether JPK arrived in Koidu Town around 4 March and left three days later, or whether JPK arrived in Koidu Town around 1 March and left on 4 March, the Defence finds that the interpretation of this fact is not clear and agrees to remove it from consideration. However, to give the rest of the Fact some temporal reference, the Defence will simply refer to March 1998.

judicial economy and consistency of case law, without prejudicing the Prosecution, especially considering that most of the facts are based on prior testimony of Prosecution witnesses.

20. To the extent that the Trial Chamber considers and agrees with the Prosecution's objections to certain facts, the Defence would agree to the amendments or reformulations as described above in paragraph 18.

Respectfully Submitted,

**Courtenay Griffiths, Q.C.**
**Lead Counsel for Charles G. Taylor**
Dated this 24th Day of February 2009
The Hague, The Netherlands

## Table of Authorities

***Prosecutor v. Taylor***

*Prosecutor v. Taylor,* SCSL-03-01-T-738, "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)", 19 February 2009

**ICTY**

*Prosecutor v. Hadzihasanovic and Kubura,* IT-01-47-T, "Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005", 14 April 2005. Internet: http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/6c3f0d5286f9bf3cc12571b500329d62/1c12ae9c2c490f57c12571fe004be47e?OpenDocument

**ICTR**

*Prosecutor v. Ntakirutimana,* ICTR-96-10-T and ICTR-96-17-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", 22 November 2001. Internet : http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/ae8b14e4f811c6b7c12571b5003803bb/7154a8722c8751c0c12571fe004fa3a6?OpenDocument