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SCSL-2004-15-PT.
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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: The Trial Chamber
Judge Bankole Thompson
Judge Benjamin Itoe
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 26 April 2004

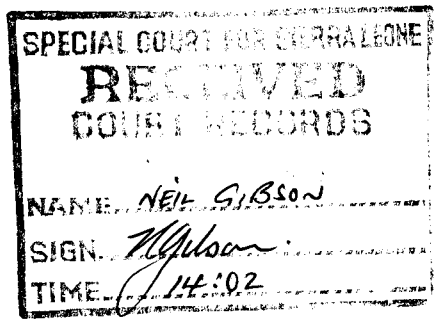
THE PROSECUTOR

Against

ISSA SESAY

MORRIS KALLON

AUGUSTINE GBAO



Case No. SCSL – 2004 – 15 – PT

REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR JUDICIAL NOTICE OR ADMISSION OF EVIDENCE

Office of the Prosecutor:
Mr. Luc Côté
Mr. Robert Petit

Defence Counsel:
Mr. Girish Thanki
Prof. Andreas O'Shea
Mr. Kenneth Carr

SPECIAL COURT FOR SIERRA LEONE

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REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE

The Prosecution files this reply to the Defence Response to Prosecution's Motion for Judicial Notice and Admission of evidence.

I. BACKGROUND

1. On 2 April 2004, the Prosecution filed a Motion for Judicial Notice and/or Admission of the facts stated in the Annexes attached to the said Motion. Counsel for Gbao ("Accused") filed a response ("Response") on 21 April 2004 admitting the facts stated in paragraph 13 of the Response and asking the court to reject the other facts stated in Prosecution's Annex A. The Prosecution files this reply to the Defence Response.

II. DEFENCE SUBMISSIONS

2. The Defence objections are as follows:
    a. The Prosecution Motion is premature.

b. That political and financial considerations cannot be allowed to interfere with the Accused's right to a fair trial.

c. That the Court should not take judicial notice of facts as doing so would prevent the Defence from producing evidence to the contrary and the Court should not put itself in a position where it is forced to ignore that it has made a mistake, been mislead or made a finding that does not accord to the truth.

III. ARGUMENTS

Preliminary matters

3. In the first paragraph of its Response, the Defence asserts that it is "misleading for the Prosecution to state that Counsel for Gbao have not responded ..." and further asserts that "[i]f the Prosecution publicly pretend that there has been no communication from the Defence when there has been correspondence . . . " The Prosecution objects to these assertions made by the Defence. The Prosecution acknowledges receiving an email/letter from the Defence but the fact that the same was not mentioned in its Motion was not deliberate, misleading or done under some false pretence as the Defence asserts.

4. In paragraph 5 of its Motion, the Prosecution stated that "Counsel for Accused *Gbao* did not respond." This was preceded by a statement in the said paragraph that Counsel for Accused Kallon and Sesay had filed responses to the Prosecutor's Request to Admit Facts on 18 March 2004. In this context, the Prosecution's reference to the Gbao Defence failing to respond clearly meant that the Defence had not filed a formal response as entitled to under the Rules. The said email/letter does not amount to a response under the Rules and as such the Prosecution was correct in its assertion that the Defence filed no response to the Prosecution's Request to Admit Facts.

Motion Premature

5. In paragraph 2 of its Response, the Defence submits that the Prosecution Motion to take judicial notice of facts or admit evidence is premature. It submits that the Trial Chamber may or should only address questions of evidence after the commencement of the trial and following the completion of opening statements. Without advancing any or any cogent

reasons for the same, the Defence further invites the Court to depart from the reasoning of the ICTR in *Prosecutor v Semanza* on this issue.

6. With respect to the Defence, the Prosecution submits that the said motion is not premature. It submits that this is the appropriate time to file such a motion and not after the commencement of the trial. In *Semanza*, the Tribunal held that "[i]n the interest of aiding the parties in preparing their respective trial presentations the Chamber is constrained to take judicial notice of some of the facts ...at this time. This Decision shall become part of the trial record of this case."[1] The Prosecution endorses this argument and submits that to wait until trial will be untimely and inconvenient as the parties will be uncertain as to the facts which are or are not in issue. Deciding the issue of judicial notice at this stage will lead to a better organisation of the trial and in consequence a speedy trial.
7. The Defence further argues that as regards admission of evidence under Rule 89 it is unreasonable to expect the Defence to consider the admissibility of the documents at this stage. The Prosecution reiterates its argument advanced in its motion that international jurisprudence embodies the principle of "extensive admissibility of evidence." In *Blaskic,* the Trial Chamber authorised the presentation of evidence without it being submitted by a witness. The Trial Chamber relied on various criteria for this and stated that "[a]t the outset, it is appropriate to observe that the proceedings were conducted by professional Judges with the necessary ability for first hearing a given piece of evidence and then evaluating it so as to determine its due weight with regard to the circumstances in which it was obtained, its actual contents and its credibility in light of all the evidence tendered. Secondly, the Trial Chamber could thus obtain much material of which it might otherwise have been deprived. Lastly, the proceedings restricted the compulsory resort to a witness serving only to present documents. In summary, this approach allowed the proceedings to be expedited whilst respecting the fairness of the trial and contributing to the ascertainment of the truth."[2] The Prosecution submits that the same reasoning applies to this case and urges the Trial Chamber to apply the same.

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[1] Para 44.

[2]Prosecutor v. Blaškić, IT-95-14-T, Judgement, 3 Mar. 2000 para 35. Similarly, in Prosecutor v. Delalić et al., (Celebici) IT-96-21-T, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, 19 Jan. 1998, para. 20, the ICTY explained that "[t]he threshold standard for the admission of evidence...should not be set

"Political and Financial Considerations"

8. The Defence states that the Prosecution's argument that the limited mandate of the Court necessitates a liberal application of the principle of judicial notice is misplaced. It submits that political and financial considerations cannot be allowed to interfere with the accused right to a fair trial and states further that it would constitute a denial of justice and the fundamental principle of the right to a fair trial. The Defence asserts without illustrating how the same, if at all, interferes with the rights of the accused to a fair trial or constitute a denial of justice.
9. The Prosecution denies that taking judicial notice or admitting the said facts and documents will negatively or unfairly interfere with the rights of the Accused to a fair trial and/or constitute a denial of justice. It reiterates its submission in its Motion that taking judicial notice of these facts or admitting the same into evidence is consistent with the spirit of the Statute and general principles of law and with a fair determination of the matter before the Court, as it would promote judicial economy without adversely affecting the rights of the individual Accused to a fair trial.
10. The Prosecution further submits that the judicial process does not take place in a vacuum. It is dependant on the realities within which it is exercised and the factual issues raised in the Prosecution's Motion should be part of this consideration. In the instant case, the fact that the mandate of the Special Court is of limited duration is a reality. The Prosecution urges the Court to find the balance between the principle of judicial economy and the right of the Accused to a fair trial.[3]
11. The Defence argues that the effect of taking judicial notice is to foreclose the defence producing evidence to the contrary. It argues that the Court should never be put in a position where it is forced to ignore that it has made a mistake, been mislead, or otherwise made a finding that does not accord with the truth.

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excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence gathered." The Tribunal relied on the notion that "the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight." Celebici Evidence Decision no. 3, 19 January 1998, para. 20.

[3] *Simic* Decision on Judicial Notice, 25 Mar. 1999, para. 17; *Nyiramasuhuko* Decision on Judicial Notice, 15 May 2002, para. 36.

12. With respect to the Defence, the Prosecution submits that this argument is untenable and is not a correct statement of the law and practice of international tribunals. The effect of the Defence submission is tantamount to saying that judicial notice should never be taken of any facts or documents.
13. The Prosecution submits that the rationale behind judicial notice is the principle of judicial economy. When facts are judicially noticed they are conclusive and evidence cannot be led to contradict these facts. The entire purpose of judicial notice will be defeated if the Defence is allowed to call evidence at the trial to rebut the same as the Defence suggests in paragraph 5 of its response.

Applicable Principles

14. The Defence argues that in order to fully respect the rights of the Accused, facts of common knowledge should be non-controversial, indisputable, non-legal and involve assertions of criminal activity covered by the indictment. The Defence provides no authority for this submission. The Prosecution reiterates its definition of common knowledge in *Prosecutor v. Semanza* as "those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the law of nature". It further held that, "for the present purposes, common knowledge encompasses those facts that are generally known within a tribunal's territorial jurisdiction" and that "there is no requirement that a matter be universally accepted in order to qualify for judicial notice". This definition and the practice of international tribunals show clearly that the test advanced by the Defence and unsupported by any legal authority is inordinately high.
15. In paragraph 7 of its response, the Defence submits that the facts of common knowledge should inter alia be "indisputable". However, in paragraph 9 of the same response, it states that the Court should not take judicial notice of matters which are subject to reasonable dispute. These statements are contradictory. In the former, the Defence suggest that the facts of common knowledge should not be in dispute at all and in the latter it applies the test of "reasonable dispute". The Prosecution submits the correct test is the latter.

Judicial Notice in this case

16. As regards paragraph 13 of the Defence Response, the Prosecution submits that the facts stated in the paragraphs mentioned in the same are proper subjects for judicial notice as they are matters of common knowledge within the meaning of Rule 94.

17. Generally, the Prosecution further argues that all the facts stated in Annex A but not mentioned in paragraph 13 of the Defence Response are also proper subjects for judicial notice as they are matters of common knowledge within the meaning of Rule 94.

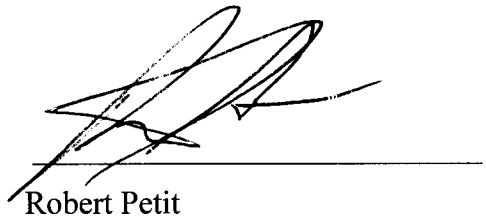
III. CONCLUSION

18. For the foregoing reasons, the Prosecution submits that the Trial Chamber dismiss the Defence Response in so far as it seeks to have the Prosecution Motion dismissed.

Freetown, 26 April 2004.

For the Prosecution,

Luc Côte



Robert Petit