SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 17 May 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY

MORRIS KALLON

AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – PT

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

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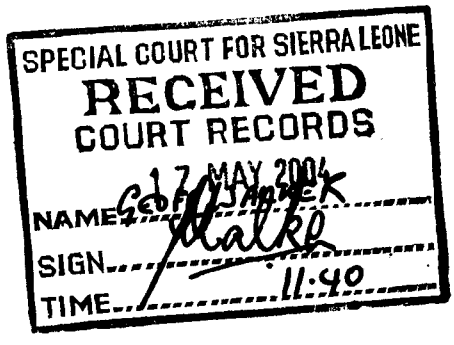

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The Prosecution files this reply to the Defence Response to Prosecution Motion for Judicial Notice and Admission of Evidence..

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. On 19 April 2004, Defence Counsel for Kallon ("Accused") filed a Motion requesting the Trial Chamber to extend the time limit for responding to the Prosecution's Motion. On 1 May 2004, the Chamber ordered the Defence to file its response within the next 10 days. On 11 May 2004, Defence Counsel for the Accused filed a response ("Response") admitting the facts stated in paragraph 18 of the Response and asking the Court to reject the other facts stated in the Prosecution's Annex A. Furthermore, the Defence accedes to the taking of judicial notice

of the existence of certain UN documents specified in paragraph 21 of its Response. The Prosecution files this reply to the Defence Response.

II. DEFENCE SUBMISSIONS

2. The Defence objects to taking judicial notice of the facts stipulated in Annex A to the Prosecution's Motion, with the exception of the facts referred to in paragraph 18 of its Response, on the grounds that these facts cannot be judicially noticed as they do not satisfy the required test. The Defence further objects to taking judicial notice of the facts contained in the documents listed in Annex B to the Prosecution Motion, arguing that these facts are irrelevant to the case and that their reliability was not established. The Defence also objects to taking judicial notice of the existence of the documents listed in Annex B to the Prosecution Motion, with the exception of certain documents referred to in paragraph 21 of the Defence Response, on the basis that they are irrelevant, contain disputed allegations and bias.

III. ARGUMENTS

Facts stipulated in Annex A to the Prosecution's Motion

3. The Defence, in paragraph 19 of its Response, asserts that the facts stipulated in Annex A to the Prosecution's Motion, with the exception of the facts referred to in paragraph 18 of its Response, "are not proper subjects to Judicial notice and do not satisfy the required test". It subsequently specifies the reasons underlying its argument, with relation to each of the facts subject to its objection.
4. With relation to facts (A) and (Y) in Annex A to the Prosecution's Motion, the Defence disputes the Prosecution's submission that the conflict in Sierra Leone was a single conflict which started in March 1991 and terminated in January 2002. It argues that the concluding of peace and cease fire agreements demonstrates that there were several conflicts with intervals in between. It is the Prosecution's submission that, under international law, the termination of an armed conflict is not marked by the mere signing of a peace agreement, but rather, by the fulfilment of the conditions stipulated therein, such as the disarmament of combatants and the cessation of expressions of hostilities. It is therefore submitted that the conflict in Sierra Leone was a single conflict which lasted

from March 1991 until January 2002, and since this fact is well established in various authoritative sources, it deserves to be judicially noticed as a fact of common knowledge.

5. With relation to fact (C) in Annex A to the Prosecution's Motion, the defence disputes the Prosecution's submission that there existed a "nexus" between the armed conflict and all acts or omissions charged in the Amended Indictment as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law. The Defence bases its arguments on the assertion that taking judicial notice of this nexus requires the Court "to find that the conduct of the Accused violated the law". The Prosecution denies this assertion, as what is requested of the Court is the mere taking of judicial notice of the nexus that existed between the conflict and the events that took place in Sierra Leone at the time, which were characterized in the Indictment as "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law". The Court is not required to make any inferences regarding the responsibility of the Accused, or to find that such violations occurred, as these issues will have to proven at trial.
6. With relation to fact (D) in Annex A to the Prosecution's Motion – that "the Accused and all members of the organized armed factions engaged in fighting within Sierra Leone were required by International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions" – the Defence asserts that this is a legal conclusion and not a fact. It also argues that the Court may not take judicial notice of this detail since the "RUF was not a subject of International law" and therefore "could not be bound by the terms of an International treaties". The Prosecution submits that under certain circumstance the Court may take judicial notice of a legal conclusion, in accordance with the ruling of the ICTY in *Kvocka* that "even if Rule 94 is concerned only with judicial notice of facts and documentary evidence, no provision in the Statute or the Rules forbids the Trial Chamber, having taken account of the rights of the accused, from drawing legal conclusions based on facts thereby established beyond a reasonable doubt".[1] It is further submitted, that under customary international law, criminal

[1] *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Decision on Judicial Notice, 8 June 2000, para. 27.

responsibility is incurred by private individuals and non-state actors, as well as government officials, who violate fundamental norms of International Humanitarian Law during armed conflict, regardless of being party to a treaty. The ICTY in *Tadic*,[2] established that the obligations under common Article 3 to the Geneva Conventions are a part of customary international law, and that "violations of these prohibitions can be enforced against individuals". Moreover, the Prosecution submits that this is the basis underlying the notion of individual criminal responsibility which was first established in the Nuremberg trials. According, the Court should judicially notice fact (D).

7. With relation to fact (F) in Annex A to the Prosecution's Motion – that "all acts and omissions charged in the Indictment as Crimes Against Humanity were committed as part of a widespread and systematic attack directed against the civilian population of Sierra Leone", the Defence argues in its Response that the Prosecution, by requesting to take judicial notice of this fact, is actually seeking "to have the Chamber find that it has proven certain elements of Crimes Against Humanity". The Defence also argues that "to judicially notice "F" would be to notice both an "ultimate fact" and an "unadorned legal conclusion". The Prosecution asserts that it is not requesting the Court to judicially notice that Crimes Against Humanity took place in sierra Leone, but merely to take judicial notice of the fact that certain acts were committed as part of a widespread and systematic attack directed against the civilian population. The mentioning of the term "Crimes Against Humanity" was done in the context of making reference to these acts, as they were alleged in the Indictment as constituting Crimes Against Humanity, instead of describing them all over again.

8. With relation to fact (G) in Annex A to the Prosecution's Motion – that "the civilian or civilian population referred to in the Indictment were persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities", the Defence submits that since the Prosecution did not refer in its Motion to the behaviour of the civilians, and therefore failed to establish that they took no active part in the hostilities, this fact cannot be judicially noticed. The Prosecution submits that under international humanitarian law, a distinction is made between civilians and combatants. While combatants take an active part in the hostilities, civilians do not. This distinction is

[2] *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 Aug. 1995, para. 65.

clearly established in the 'Geneva Convention relative to the Protection of Civilian Persons in Time of War', adopted on 12 August 1949. Accordingly, a civilian who takes up arms and joins the fighting, has in fact turned himself into a combatant and no longer belongs to the category "civilians". Hence, when the Prosecution initially characterizes someone as a "civilian" or a group of people as a "civilian population", inherent to this term is the notion that they are not participating in the hostilities. The Prosecution submits that this distinction between combatants and civilians is a matter of common knowledge. The Prosecution accordingly reasserts that and there is no basis to deny its request to take judicial notice of fact (G).

9. With relation to facts (H), (K), (L), (S), (Q), (Z), (AA), (BB) and (CC) in Annex A to the Prosecution's Motion, the Defence asserts that these issues are contentious issues subject to proof at trial. It is the Prosecution's submission, that the names of the factions involved in the conflict, as well as their targets, goals and methods, are all well-documented by authoritative sources. As such, these details qualify as facts of common knowledge and deserve to be judicially noticed, in accordance with the view expressed by the ICTR in *Semanza*, that historical facts qualify as facts of common knowledge, if they are "clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary".[3] Furthermore, it is the established practice of the international criminal tribunals to take judicial notice of facts contained in documents of the U.N. and affiliated bodies.[4] Also supportive of this practice is the language of Article 21 of the Charter of the International Military Tribunal at Nuremberg, which provides that "[t]he Tribunal shall...take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations.[5]

10. Furthermore, the Prosecution submits that the standard for determining whether facts are

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[3] *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, 3 Nov. 2000 ("*Semanza* Decision on Judicial Notice, 3 Nov. 2000"), para. 25. The Tribunal cited from Archibold Criminal Pleading, Evidence & Practice § 10-71 (England, 2000) and also relies on Phipson on Evidence, at § 2-06; United States of America Federal Rule of Civil Procedure § 201(B).

[4] *Semanza* Decision on Judicial Notice, 3 Nov. 2000, para. 29.

[5] Charter of the International Military Tribunal at Nuremberg, Article 21.

"common knowledge" is not that they are undisputed, but rather that they cannot be *reasonably* disputed, or, if the facts are, as was held in *Simic*, "capable of immediate and accurate demonstration by resorting to readily accessible sources of indispensable accuracy".[6] The Prosecution respectfully submits that the said facts satisfy this standard.

11. With relation to facts (I) and (J) in Annex A to the Prosecution's Motion, the Defence submits that these details are outside the temporal jurisdiction of the court and are irrelevant to the issue at hand. It is the Prosecution's submission that it is a matter of settled law, that evidence pertaining to a period outside the temporal jurisdiction of the Court, may be admitted if it is relevant to the allegations which form the subject matter of the proceedings. The Prosecution asserts, that establishing facts (I) and (J) is necessary in order to understand the context of the issues forming the subject matter of this case. Furthermore, the fact that the Rules allow for admission of evidence demonstrating 'a consistent pattern of conduct', even if it was not covered by the indictment illustrate that such evidence is not deemed irrelevant.[7]
12. With relation to facts (P), (R), and (W) in Annex A to the Prosecution's Motion, the Defence asserts that, albeit the existence of "some form of cooperation" between the AFRC and RUF and in light of "factions emerging or splits", to characterize them as a joined unit or alliance is incorrect. The Prosecution asserts that the alliance between the factions was common knowledge, evidenced by the extensive documentation of this fact in authoritative resources, such as the UN reports listed as documents number 10-25 in Annex B to the Prosecution Motion.

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[6] *Prosecutor v. Simic 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 Mar. 1999, para. 17.

[7] Pursuant to Rule 93, it is possible to introduce evidence of instances not necessarily covered by the indictment, which demonstrates 'a consistent pattern of conduct' in order to prove elements such the intent of the accused, his motive, knowledge, identity, opportunity, preparation, plans, mode of operation, position of authority, etc. In *Galic*, the ICTY permitted the Prosecution to submit evidence of an incident which was not covered by the indictment, as corroborating evidence of a consistent pattern of conduct pursuant to Rule 93 of the Rules of Procedure and Evidence of the Tribunal. See *Prosecutor v. Galic,* Decision on the Defence motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should be Considerred as the Amended Indictment, IT-98-29-PT, 19 October 2001, paras. 16 and 23. Also see *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 159; *Prosecutor v. Bagilishema*, Case No. ICTR-951A-T, 7 June 2001,paras. 50 and 63.

Documents listed in Annex B to the Prosecution's Motion and the facts stipulated therein

13. The Defence objects to the taking of judicial notice of the facts contained in the documents listed in Annex B to the Prosecution Motion, on the grounds that they are irrelevant to the case, as they concern events which occurred during the 1990's in Sierra Leone without specifying the connection to the charges against the Accused, and that their reliability was not established. The Prosecution reasserts that, under international law, wide discretion is granted to the Trial Chamber in deciding which evidence is "relevant".[8] Furthermore it is reaffirmed, that under international law, evidence pertaining to a period outside the temporal jurisdiction of the court, may be admitted if it is relevant to the allegations forming the subject matter of the proceedings. It is the Prosecution's submission, that knowledge of the facts detailed in the documents listed in Annex B, is pertinent to the understanding the subject matter of this case. Furthermore, even the Rules (in Rule 93) provide for the admission of evidence regarding instances not covered by the indictment, so long as it demonstrates 'a consistent pattern of conduct'.
14. The Prosecution reasserts, as stated in its motion for judicial notice and admission of evidence, that the documents listed in Annex B were published by the United Nations and other official and internationally recognized sources, rendering the facts contained therein 'facts of common knowledge' that may be judicially noticed under rule 94(A). The Prosecution reassert, that in the alternative, these facts should be admitted as evidence.
15. The Defence also objects to taking judicial notice of the existence of the documents listed in Annex B, or to admitting them into evidence, with the exception of certain documents referred to in paragraph 21 of the Defence Response. Its objection is based on the assertions that these documents are irrelevant, contain disputed allegations and biases. The Prosecution reasserts that international jurisprudence embodies the principle of "extensive admissibility of evidence".[9] The Prosecution further reaffirms that under international law, in deciding which evidence is "relevant", wide discretion is granted to the Trial Chamber.[10] In addition, it is submitted that the mere admission into evidence,

[8] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 Sept. 2003, para. 18.
[9] *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 Mar. 2000 ("*Blaškić* Trial Judgement, 3 Mar. 2000"), para. 34; see also Rule 95.
[10] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 Sept. 2003, para. 18.

has no bearing on the weight it is eventually accorded, and that considerations pertaining to the content of the evidence, such as potential disputed allegations and biases, are relevant to the evaluation stage and not the admission stage.

III. CONCLUSION

16. For the foregoing reasons the Prosecution respectfully requests that the Trial Chamber grant its Motion and dismisses the Defence Response.

Freetown, 17 May 2004

For the Prosecution,

Luc Cote

Robert Petit