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SCSL - 2004 - 15 - PT
(1606 - 1616)

IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

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

Registrar: Mr Robin Vincent

Date transmitted to Defence Office electronically: 19th April 2004
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Case No. SCSL 2004 – 15 – PT

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO

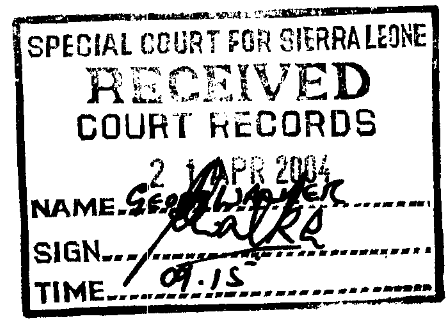
GBAO'S RESPONSE TO PROSECUTION'S MOTION FOR JUDICIAL NOTICE OR ADMISSION OF EVIDENCE

Office of the Prosecutor

Mr Luc Cote, Chief of Prosecutions
Mr Robert Petit

Counsel for Augustine Bao

Mr Girish Thanki,
Professor Andreas O'Shea
Mr Kenneth Carr



Counsel for co-accused

Mr Timothy Clayson and Mr Wayne Jordan for Issa Sessay
Mr Sheku Turey for Morris Kallon

Preliminary considerations

1. It is misleading for the prosecution to state that counsel for Gbao have not responded when, while no official response has been filed with the Registry, an e-mail has been forwarded to prosecution counsel through the defence office, explaining the position of the defence for Gbao on the prosecution's proposed time limit on admission of facts. If the prosecution publicly pretend that there has been no communication from the Defence when there has been correspondence, then the Defence will have no other choice than to officially file all responses to prosecution requests, that which is not always in interests of saving time and costs.

2. It is submitted that the prosecution motion to take judicial notice of facts or admit evidence is premature. The Defence for Gbao respectfully 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. The court is invited therefore to depart from the reasoning of the Trial Chamber in *Prosecutor v Semanza* on this point. The exceptional nature of judicial notice makes it unlikely that dealing with this issue prior to the commencement of the trial will make any significant difference to pre-trial preparations. On the other hand the parties are placed in the best possible position to address the issue of judicial notice once they have made substantial strides in trial preparation such as to have a sound awareness of what are those exceptional matters of common knowledge and what are matters of reasonable or necessary dispute. From a defence point of view, in so far as the court will not or is unlikely to go back on a finding of judicial notice, it is a matter requiring the greatest care.

   With regard to the admission of documents into evidence under Rule 89, it is submitted that these arguments apply even more forcefully. Furthermore, documents might be considered inadmissible for any number of reasons and it is unreasonable to expect the defence to be in a position at this stage to consider and argue in a 10 page response the admissibility and, necessarily for this purpose, relevance, source, availability of better evidence, purpose of admission and probative value of the mass of documents referred to

by the prosecution. In the alternative, if the court accepts that the issue of admission of evidence can be dealt with now and in this manner, and further without any context of witness testimony, the Defence requests in the interests of justice and a fair trial it be granted a reasonable period of time to inspect, analyse and consider the admissibility of all these documents and an extensive page limit before it can respond on each.

3. Further and or in the alternative, if, which is not admitted, it is proper to address issues of proof prior to trial, it is submitted that since the provision on judicial notice is mandatory in nature, relates to facts of common knowledge and may have the effect of denying the defence the either the real opportunity or even perhaps the right to present evidence on those facts, it is submitted that this procedure is by its nature one of exceptional application.

4. The prosecution argument that the limited mandate of the court necessitates a liberal application of the principle of judicial notice is misplaced. It is submitted that this political and financial consideration cannot be allowed to interfere with the accused right to a fair trial and all the affiliated rights which flow from that. It is submitted that it would constitute a denial of justice and the fundamental principle of the right to a fair trial for the court to admit facts without proof more liberally because those who have established the court have not provided adequate resources or a sufficient time frame to deal with the quantity of evidence involved in the case.

5. On the issue of the effect of taking judicial notice, the defence acknowledges that the view has been taken in previous jurisprudence before other ad hoc tribunals that it has the effect of foreclosing the possibility of the defence producing evidence to prove the contrary. However, it is submitted that a court should never be placed 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. When it was thought a fact of common knowledge that the world was flat, who could have imagined that, subsequently, this would be demonstrated to be incorrect. The practice of taking judicial notice of facts of common knowledge can still serve the interests of expediency by merely not

requiring the prosecution to produce formal proof on the matter. The defence will be discouraged from attempting to assert the contrary by virtue of the finding and the obvious nature of the point, if one is really dealing with a fact of common knowledge. It is respectfully submitted that it is not necessary to go further and deny the possibility of rebuttal in all circumstances. In so far as this submission is not accepted, this will serve to highlight the importance of confining the doctrine to the most exceptional cases.

Applicable principles

6. It is respectfully submitted that the expressions 'judicial notice' and 'facts of common knowledge' must be interpreted having regard to the fundamental rights of the accused as set out in the Statute and the Rules, general principles of law and especially the notion of judicial notice as understood in common law jurisdictions, together with previous jurisprudence of ad hoc tribunals and the rules of procedure and evidence of the International Criminal Court.

7. It is submitted that the notions of 'judicial notice' and 'common knowledge' are necessarily highly restricted by the right of the accused to a fair trial and in particular the presumption of innocence and resulting burden and standard of proof resting on the prosecution. All principles developed in this court in relation to the rule on judicial notice should have full respect for these rights and not compromise them in any way. Consequently, in order to fully respect these rights it is submitted that facts of common knowledge should be non-controversial, indisputable, non-legal and not involve assertions of criminal activity covered by the indictment. It is respectfully submitted that the prosecution's reliance on the ICTY case of *Kvocka* is misplaced and misleading since that Chamber decided on the basis of admissions from the parties.

8. The court can be usefully guided by the principles developed in the prior jurisprudence of ad hoc international criminal tribunals. This is a proposition accepted by the prosecution and the defence. The prosecution wishes to extend the boundaries for reasons set out above, whereas the defence for Gbao would

encourage the court to accept the good sense of the essentially restrictive approach taken by other tribunals and reject the few instances where these tribunals have exceeded what is fair to an accused entitled to a trial on the facts pertaining to the allegations against him. We request the Court to preserve the wisdom of the proposition reflected in the practice of national courts that judicial notice is necessarily a tool of the most exceptional application.

9. The first principle which the court is invited to adopt is that a court should not take judicial notice of matters which are subject to reasonable dispute.[1] Here the prosecution relies on a number of documents. It is relevant to consider whether the accuracy of the contents of those documents can be reasonably be disputed.

10. The second principle which follows naturally from the plain meaning of 'facts' is that a court should not take judicial notice of legal conclusions or conclusions of mixed law and fact. These are matters more properly left for trial and legal argument.[2]

11. The third principle of importance for preserving the right to a fair trial and the presumption of innocence is, it is submitted, that judicial notice should not be taken of alleged facts which constitute fundamental elements of crimes charged in the indictment.[3] This is closely associated with the previous

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[1] See *Prosecutor v Semanza*, Decision on Prosecutor's motion for judicial notice and presumptions of facts pursuant to Rules 94 and 54, 3 November 2000, Case No. ICTR 97-20-I (ICTR Trial Chamber), par 24;; *Prosecutor v Sikirica*, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000, IT-95-8-T; *Prosecutor v Ntakirutimana*, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, pr 29; *Prosecutor v Nyiramasuhuku* et al, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, par 39

[2] *Prosecutor v Ntakirutimana*, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, par ; *Prosecutor v Semanza*, Decision on Prosecutor's motion for judicial notice and presumptions of facts pursuant to Rules 94 and 54, 3 November 2000, Case No. ICTR 97-20-I (ICTR Trial Chamber), par 35; *Prosecutor v Simic*, 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-Herzogovina, 25 March 1999, IT-95-9-PT (ICTY Trial Chamber); *Prosecutor v Sikirica*, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000, IT-95-8-T; *Prosecutor v Nyiramasuhuku* et al, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, par 39

[3] *Prosecutor v Ntakirutimana*, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, (not taking judicial notice of 'widespread and systematic attack' or

principle, but has an independent importance in order to preserve the essence of the notion of a fair trial.

12. Fourthly, a court should not take judicial notice of matters which are too marginal, indirect or of remote connection to the issues in the case such that taking judicial notice of them does not materially advance the proceedings, the principle purpose of judicial notice.[4]

Judicial notice in this case

13. It is accepted that the facts set out in paragraphs B,E, H, K, L, M, N, O, P, Q, S, T, U, V, W and X to the prosecution motion may constitute proper subjects for judicial notice because they are indeed facts capable of being seen as facts of common knowledge within the meaning of rule 94 and do not prejudice the accused right to a fair trial.

14. However, it is respectfully submitted that the remaining facts as listed in annex A and repeated below are not proper subjects of judicial notice for the reasons set out hereinafter:

    (a) The conflict in Sierra Leone occurred from March 1991 to January 2002
    It is submitted that this suggested time span is not a matter of common knowledge in that it is a matter of reasonable dispute as to what extent conflicts in Sierra Leone between these dates were continuous or necessarily interconnected, having regard inter alia to the identification of the parties and the period and nature of their activity, such that one can speak of one conflict. The suggested fact is therefore both too vague as to what the suggested dates are referring to and as too whether it is referring to a continuous and single conflict or discontinuous and/or disparate conflicts.

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genocidal plan); *Prosecutor v Semanza*, Decision on Prosecutor's motion for judicial notice and presumptions of facts pursuant to Rules 94 and 54, 3 November 2000, Case No. ICTR 97-20-I (ICTR Trial Chamber), par 36 (not taking judicial notice of existence of genocide)

[4] *Prosecutor v Ntakirutimana*, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, par 27; *Prosecutor v Nyiramasuhuku* et al, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, par 90

Furthermore, the cited sources of information are insufficiently expert in nature to constitute evidence of common knowledge about a fact. In the absence of a fact being commonly known in the sense that it is so obvious to most people within Sierra Leone, it is submitted that for judicial notice to be taken of it, it must be commonly known in the sense that it can be readily ascertained by reliable and multifarious sources. The Secretary-General's report is not the result of an impartial, expert and concerted fact finding inquiry and further does not refer to any recognised expert historical source for its finding as to periods. The Speech of President Kabbah is partial, being stated by the leader of the party to the conflict or conflicts with the RUF, the later being the subject of the exercise of criminal jurisdiction. The third document is not based on reference to recognised expert historical source material. Cumulatively, these three documents provide an unclear and insufficient basis for asserting common knowledge as opposed to barely repeated assertion.

Further, judicial notice should not be taken of facts which do not materially advance the proceedings, the very purpose of judicial notice. Thus, facts predating the period covered by the jurisdiction of the court are not, it is submitted, within the purview of rule 94. So reference to the beginning or continuation of the conflict, preceding the commencement of the court's jurisdiction, does not materially advance the proceedings and should not be judicially noticed

(c) A nexus existed between the armed conflict and all acts or omissions charged 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.

It is respectfully submitted that the above statement cannot be the subject of judicial notice because it is premised on the existence of a central matter of dispute, i.e. the commission of acts or omissions charged in the indictment as international crimes. Further, it makes an assertion that would constitute one of the essential elements of criminal responsibility for war crimes and should not therefore be the subject of judicial notice.

The prosecution must be put to proof on all the essential elements for the establishment of international criminal liability.

(d) The accused and all members of organised armed factions engaged in fighting within Sierra Leone were required to comply with International Humanitarian Law governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions

It is respectfully submitted that this is a legal conclusion rather than a statement of a fact and is therefore not a proper subject for judicial notice. Further or in the alternative, it is subject to reasonable dispute because of the possible legal argument, supported by the Appeal Chamber's decision on amnesty under the Lome Accord, that since the RUF was not a subject of international law capable of entering into internationally binding agreements, it could not be bound by the terms of an international treaty. In the alternative, reference could be made to the principle of *pacta tertiis nec nosunt nec prosunt* or the provision made in the Geneva Convention for a specific procedure being followed in the event of a rebel movement choosing to voluntarily accept the provisions of humanitarian law.

(f) All acts and omissions charged in the indictment as Crimes Against Humanity were committed as part of a widespread and systematic attack against the civilian population of Sierra Leone

In our respectful submission judicial notice cannot be taken of the alleged fact that crimes were committed since this is the subject of the trial for which the burden of proof rests on the prosecution. Furthermore, the reference to 'all acts and omissions' charged in the indictment as Crimes against Humanity takes the assertion well beyond the possible scope of matters of common knowledge. In addition, several legal questions and questions of mixed law and fact are being addressed in this statement, including an essential element of crimes against humanity, namely the widespread or systematic nature of attacks against the civilian population. It is submitted that such legal conclusions and conclusions involving questions of mixed law and fact are not the proper subject of judicial

notice which is confined to 'facts'. Further, while it might be possible to find common knowledge of a pattern of activity as widespread, it is submitted that the connotations of the word systematic, make it extremely unlikely that the systematic nature of activity could be common knowledge except in rare circumstances where the system was the essence of the activity, such as in the case of the nazi holocaust. Therefore, the conjuction of widespread with systematic into 'widespread and systematic' effectively removes the alleged fact from the plausible scope of matters of common knowledge.

(g) The civilian or civilian population referred to in the indictment were persons who took no active part in the hostilities.

The Indictment refers to a long period and most regions of the country. It is therefore inconceivable that it could be common knowledge that the civilian population in all areas took no part in hostilities at all relevant times, simply because people in one area would not have knowledge of the circumstances in another and only older people could reasonably be expected to have detailed knowledge of the behaviour of civilians over a 6 year period. The prosecution has in any event failed to produce a comprehensive periodic and geographic survey of the behaviour of civilians in Sierra Leone, which is so reliable, attested, supported and recognised that it could form the basis of a finding of common knowledge with respect to the above assertion. Further or in the alternative, this assertion goes to whether acts or omissions are said to have been committed against protected persons within the meaning of the Geneva Conventions, a matter of mixed law and fact, an element of criminal liability and subject to reasonable dispute.

(i) The organised armed group that became known as the RUF, led by Foday Saybana Sankoh aka Popay aka Papa aka Pa was founded about 1988 or 1989 in Libya

This assertion is not an appropriate subject for judicial notice because it refers to a period outside the jurisdiction of the court, which moreover is so marginal to the issues in the case that it does not serve to advance the proceedings, the principle justification of judicial notice.

(j) **The RUF, under the leadership of Foday Saybana Sankoh began organised armed operations in Sierra Leone in March 1991**
This assertion also is not an appropriate subject for judicial notice because it refers to a period outside the jurisdiction of the court, which moreover is so marginal to the issues in the case that it does not serve to advance the proceedings, the principle justification of judicial notice.

(k) **Shortly after the AFRC seized power, at the invitation of Johnny Paul Koroma, and upon the order of Foday Saybana Sankoh, leader of the RUF, the leader of the RUF joined with the AFRC**
The most that can be said here as a fact of common knowledge would be that there was some form of cooperation or non-hostility between the AFRC and the RUF. To be able to employ the word 'joined' would require some knowledge of specific discussions or understanding as between the two groups which could not be a matter of common knowledge.

(y) **However, active hostilities continued**

It is not common knowledge that active hostilities continued, but that the active hostilities resumed.

(z) **At all times relevant to the Amended indictment, members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF) conducted armed attacks throughout the territory of the Republic of Sierra Leone, including Bo, Kono, Kenema, Bombali, Kailahun and Port Loko districts and the City of Freetown and the Western Area**
This is a matter of reasonable dispute between the parties as to times and locations and therefore subject to proof beyond all reasonable doubt by the prosecution.

(aa) **Targets of the armed attacks included civilians and humanitarian assistance personel and peace keepers assigned to the United Nations Mission in Sierra Leone (UNAMSIL), which had been created by United Nations Security Council Resolution 1270 of 1999**
This statement cannot, it is submitted, form the basis of judicial notice since this assertion constitutes part of the elements of crimes charged in the indictment and must therefore be subject to proof.

(bb) **These attacks were carried out primarily to terrorise the civilian population, but also were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to**

the Kabbah government or to government forces. The attacks included unlawful killings, physical and sexual violence against civilian men, women and children, abductions and looting and destruction of civilian property. Many civilians saw these crimes committed. Others returned to their homes or places of refuge to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property

Again these facts constitute elements of the crimes averred in the indictment and therefore must be subjected to proof. In addition, the motives of alleged perpetrators cannot reasonably be the subject of common knowledge for the purpose of judicial notice. Nor can, it is submitted the lawful nature of activity since this is a matter of legal analysis and conclusion

(cc) **As part of the campaign of terror and punishment the AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped; many of them were abducted and used as sex slaves and as forced labour. Some of these women and girls were held captive for years. Men and boys who were abducted were also used as forced labour; some of them were also held captive for years. Many abducted boys and girls were given combat training and used in active fighting. AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving AFRC and RUF on their bodies**

Idem

15. With respect to documents, it is respectfully submitted that the court can only take judicial notice of the existence and perhaps authenticity of documents, but not the contents thereof, save where it has been shown in relation to each specific fact that it is a fact of common knowledge which falls into a category which the Court can in its discretion take judicial notice of.

16. It is THEREFORE PRAYED that the prosecution motion be dismissed save with respect to the matters set out in paragraph 13 above.

Girish Thanki
Andreas O'Shea