IN THE SPECIAL COURT FOR SIERRA LEONE
DEFENCE OFFICE
FREETOWN – SIERRA LEONE

THE TRIAL CHAMBER

BEFORE:

Judge Bankole Thompson, Presiding
Judge Benjamin Itoe
Judge Pierre Boutet

REGISTRAR: Mr. Robin Vincent

DATE: 11th May 2004

PROSECUTOR against

MORRIS KALLON
(Case NO. SCSL 2004 – 15-PT)

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

OFFICE OF THE PROSECUTOR:

Luc Cote, Chief of Prosecutions
Robert Petit, Senior Trial Attorney
Paul Flynn
Abdul Tejan-Cole
Leslie Taylor
Boi-Tia Stevens
Christopher Santora
Sharan Parmar

DEFENCE:

Shekou Touray
Raymond M. Brown
Wanda Akin
Melron Nicol-Wilson
Wilfred Bola Carrol

Prosecutor v. Sesay, Kallon and Gbao (SCSL – 2004-15-PT)

INTROUCTION

The Defence Team for Morris Kallon apologizes to the Trial Chamber and the Office of the Prosecutor for filing this Response to the" Prosecution Motion for Judicial Notice and Admission of Evidence" (" the Motion") late, and humbly request that due consideration be given to it although it is filed out of time by just a day.

PROCECEDURAL BACKGROUND

1. By the Prosecution "Motion for Judicial Notice and Admission of Evidence" filed on the 2 April 2004, ("the Motion") the Prosecution requests:

   (1) The Chamber to take judicial notice of "the facts" set out in Annex A of the Motion and "the facts" contained in the documents listed in Annex B in accordance with Rule 94 (A) of the Rules of Procedure and Evidence of the Special Court ("the Rules") arguing that they constitute "facts of common knowledge".

   (2) Alternatively, in the event the Chamber finds that any of "the facts" set out in Annex A or the "the facts" contained in the documents listed in Annex B do not amount to "facts of common knowledge", to admit "these facts" in evidence under Rules 89(B) and (C) and 92 *bis*, to promote a fair determination of the matter before it, in accordance with the spirit of the Statute and the general principles of law and that "the same is relevant for the purpose for which it is submitted and its reliability is susceptible to confirmation".

2. Further the Prosecution emphasizes that the documents listed in Annex B include "official and internationally recognized United Nations documents and various humanitarian reports from reliable sources, hence warranting the characterization of facts contained in the documents as "facts of common knowledge".
3. Annex B captioned "Request for authenticity finding and admission of following documents" contains a list of documents alleged to have been disclosed to all Accused Persons on 18 September 2003 and March 4, 2004 before the assignment of the new Assigned Counsel for Morris Kallon on the 17 March 2004.
4. The Prosecution concedes that not all of the documents in Annex B have been disclosed.

The new Assigned Counsel mainly on grounds of the unavailability of the documents alleged to have been disclosed before his assignment and for the need for adequate preparation moved the Trial Chamber for extension of time to respond to the Motion on 19 April 2004. The Trial Chamber granted a time limit of 10 days from Saturday 1st May 2004 within which to file a Response, if any, to the Motion, during which time it was expected that all relevant documents in the possession of the previous Defence team would have been retrieved.

5. On 4 May 2004 the Trial Chamber ordered the Prosecution to file "outstanding documents" referred to in Annex B of the Motion by Friday, 7 May 2004 ("the Order"). The Order itself listed the "outstanding documents" taking into consideration that majority of the documents referred to in Annex B of the Motion have already been filed as proposed exhibits on the 26th April 2004 in compliance with the Order of 1 April 2004 for the Prosecution to file Disclosure Materials in Preparations for the commencement of Trials.
6. Included in the Chambers list of "outstanding documents" are numbers 12, 16, 21, 27 and 29 in Annex B of the Motion, which fell under the group of documents alleged to have been disclosed to the Accused persons on specific dates, and Nos. 70. 81, and 87, under the group of documents not disclosed to the Accused persons.
7. The "outstanding documents" referred to were on the 5th May 2004 filed by the Prosecution in response to the Order of 4 May 2004.

ARGUMENTS OF THE PROSECUTION

8. The reasons advanced by the Prosecution for Judicial Notice and admission of Evidence among others, are as follows:
    i. that time will be saved by taking judicial notice of the facts and document in question.
    ii. that it will be in accordance with the fair determination of the matters before the Chamber and in accordance with the Statute to judicially notice facts contained in **Annex A** and documents listed in **Annex B**.
    iii. that it is a firmly established practice for International Courts to take judicial notice of certain facts, as well as documents from certain sources and relied on the case of *Kanyabashi*, stating that the ICTR took judicial notice of facts stipulated in a range of UN reports, including those submitted by the Special Rapporteur for Rwanda.

9. The Prosecution proffers no specific factual arguments in support of its offer in respect of the supposed "stipulated" facts in **Annex A**, although each "stipulated" fact is followed by titles of documents, which the Prosecution presumably believes support the "stipulated" fact in question.

10. Further the Prosecution proffers no specific factual arguments in support of its offer of Documents in **Annex B**. Instead it argues that under Rule 94 the contents of each document would support its admission because the documents "include Official and internationally recognized UN documents and various humanitarian reports from reliable sources...."

11. The Prosecution asserts that both Annexes should be judicially noticed because "they refer to factual allegations as stipulated in the Indictment" and "do not directly implicate any of the Accused in the commission of criminal acts." Beyond these general assertions, the Prosecution makes no specific factual arguments concerning the relevance of the contents of the documents to the issues at trial, nor does the Prosecution specifically identify the safeguards, which protect the Accused from having information " which directly implicates him "noticed" and which he would be estopped from contesting. Judicial notice puts an end to "the evidential inquiry."

12. In connection with its alternative request for the admission in evidence of the documents in **Annex B** pursuant to Rules 89 and 92 *bis*, the Prosecution again makes no specific argument concerning the factual connection between the proffered material and the issues at trial of the Accused, nor of the protections accorded him. It merely asserts that the Special Court has discretion to determine relevance Additionally, the Prosecution is content to rest with the general assertion that the second prong of Rule 92 *bis*, "the possibility of confirming ...reliability" is satisfied with respect to all documents

CRITERIA FOR JUDICIAL NOTICE

13. The fact that the proceedings are conducted under a Statute which values expedition as alleged by the Prosecution does not alter the fundamental fact that the Accused is entitled

to a fair trial and the right to cross-examine. Therefore, before the Chamber may grant judicial notice of a fact or a document the Prosecution must demonstrate that the offered material is relevant, it does not concern an ultimate fact, it covers facts not in dispute and it is not a naked legal opinion.

14. **Relevance** – The Defence submits that the requesting party must "demonstrate"[1] in cogent and articulate terms that the documents offered for judicial notice are relevant to the question of the guilt or innocence of the Accused. It is settled law that evidence adduced in any form must be relevant to the issues. Reliance on judicial economy is no excuse to unduly sacrifice procedural fairness guaranteed the Accused by the Statute and the Rules.

15. **Ultimate Questions of Fact** – The Prosecution must demonstrate that it is not asking the Chamber to take notice of "ultimate facts in issue in the case". The Defence submits that the failure of the Prosecution to make such a showing would remove from itself the burden of proof and effectively deprive the Accused of the right to contest his innocence at trial, if such facts were nonetheless judicially noticed.[2]

16. **Facts not subject to Dispute** – The requesting party must demonstrate that the matters offered for judicial notice are not "subject to dispute"[3] or are not "controversial"[4] although International Tribunals have expanded[5] the use of judicial notice to bring "common knowledge and notorious history" within the ambit of the doctrine, it remains clear that "disputed" facts do not belong to this category.[6]

---

[1] Prosecutor v *Nyiramasuhuko* and *Ntahobali* (ICTR 97-21-T) and Prosecutor v *Nsasbimana* and *Nteziryayo* (ICTR-97-29A AND B-T), Prosecutor v *Kayanbashi* (ICTR-96-15-5), Prosecutor v *Ndayambaje* (ICTR-96-8-T), 98-42-T, Decision on the Prosecution 's Motion for Judicial Notice and Admission of Evidence, 15 May 2002. ("*Nyiramasuhuko* Decision) paragraph 92.

[2] The *Semanza* Decision upon which the Prosecution relies notes with approval the "caution" exhibited by the ICTR prosecutor on this point, because she conceded that to ignore this issue would "visit[...] unfair prejudice on the right of the accused." Paragraphs 3,7.

[3] *Semanza* Decision paragraphs 20, 23 and 31.

[4] *Nyiramasuhuko* Decision paragraph 39.

[5] *Semanza* Decision, Paragraph 29, However, the Accused Kallon notes the Prosecution's inappropriate reliance on Article 21 of the Charter of the IMT Nuremberg as support for the Judicial Notice Motion. (Judicial Notice Motion Note II, and Judicial Notice Motion Item 10, Prosecution Index of Authorities) As Judge May of the ICTY has noted in a law review article, "thousands" of documents admitted against the Nuremberg defendants "were documents of their own making" RICHARD MAY & MARIEKE WIERDA, Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha, 37 Colum. J. *Transnat'l* L. 725 fn 65 (1999(and text accompanying. That circumstance is clearly unlike th4 one here where the origins of most of the proffered documents are remote from the Accused. (See Also KRISTINA D. RUTLEDGE Comment And Note: "Spoiling Everything" – But for Whom? Rules of Evidence and International Criminal Proceedings, 16 Regen UL Rev 151 (2003/2004) referring to the six box cars containing the 300,000 documents used against the Nazis.

[6] Semanza Decision, paragraph 31

17. **Legal Conclusions** – The requesting party must demonstrate that it does not seek to have the Special Court notice "unadorned" legal conclusions[7]. Significantly, this principle caused the *Semanza* Trial Chamber to decline a Prosecution request to judicially notice the existence of genocide in Rwanda[8]. The *Simic* Trial Chamber similarly refused to judicially notice that the conflict in Bosnia-Herzegovina was a conflict of an international nature[9].

ARGUMENTS

18. The Defence for Kallon is prepared to accept that the facts set out in Paragraph B, E, M, N, O, T, U, V, X of **Annex A** to the Prosecution Motion may constitute proper subjects for Judicial notice because they are facts capable of being seen as facts of common knowledge within the meaning of Rule 94 and indisputable and would not prejudice the Right of the Accused to a fair Trial.

19. The Defence respectfully submits that the remaining facts listed in **Annex A** are not proper subjects for Judicial notice and do not satisfy the required test for the reasons set out below:

(A) The conflict in Sierra Leone occurred from March 1991 to January 2002.

The question of whether there was a single conflict in Sierra Leone or several conflicts with one or more intervals between them is a matter in dispute between the Accused Kallon and the Prosecution. The existence of the Lome Peace Accord, the Abidjan Peace Accord, the Conakry Accord, and the Cease Fire Agreement suggest the intermittent nature of the Sierra Leone conflict. A finding by the Special Court that "the conflict existed at a particular moment will have implications for the defence of the Accused in terms of duties and obligations imposed by humanitarian principles. Whether there were distinct phases to the conflict is a controversial factual contention, which cannot be resolved by recourse to Rule 94. The Defence submits that to judicially notice this fact would contradict the terms of the Peace Accords also

---

[7] *Nyiramasuhuko* Decision, paragraph 39
[8] *Semanza* Decision paragraph 35-37
[9] Prosecutor v Simic et al IT-95-PT, Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Conflict in Bosnia-Herzegovina, 25 Mar. 1999 (*Simic Decision*)

offered to be judicially noticed. The existence of a single continuous conflict is a controversial point in issue.

(C) 'A nexus existed between the armed conflict ...Humanitarian Law.'

It is not proper to ask the Court to Judicially Notice a "nexus" between the "armed conflict" and "all acts and omissions charged in the indictment" as legal violations. The Court is being asked before trial to find that conduct of the Accused violated the law. This is not just a matter in dispute. It is the core dispute in the trial. Judicially noticing this point would place more than a "chink" in the armor of the Accused, it would deprive him of a trial and produce a conclusion on the "ultimate issue" before trial commenced. This request also calls for a legal conclusion of the kind rejected in the *Semanza* and *Simic* decisions.

(D) 'The accused and all members of organized ...Geneva Convention'

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 nect 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 as widespread and systematic...in Sierra Leone.'

The Prosecution seeks by offering this statement to have the Chamber find that it has proven certain elements of Crimes Against Humanity. The Prosecution misconstrues the *Semanza* Decision as authority for this request. The Semanza decision did judicially notice that there were "widespread and systematic attacks" throughout Rwanda." It did not however, judicially notice that its finding on this point satisfied an element of crimes against humanity. It also did not find that the "acts or omissions" of particular accused persons fell within these categories. To

judicially notice "F" would be to notice both an "ultimate fact" and an "unadorned legal conclusion".

(F) **'The civilian or civilian population ... who took no active part in the hostilities.'** The Indictment refers to a long period and most regions of the country for it to be offered as a matter of common knowledge that the civilian population in all areas took no part in hostilities at all relevant times, knowledge of the circumstances in different localities may defer. The prosecution has in any event failed to produce a comprehensive periodic and geographic survey of the behavior of civilians in Sierra Leone, which is so reliable, attested, supported and recognized 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 have been committed against persons protected within the meaning of the Geneva Conventions, a matter of mixed law and fact, an element of criminal liability and subject to reasonable dispute.

(H) 'The organized armed factions involved in the armed conflict ... AFRC' The Defence submits that this is a contentious issue and therefore not subject to judicial notice.

(I) & (J) These assertions are not appropriate subjects for judicial notice because they refer to a period outside the temporal jurisdiction of the Special Court. They are marginal to the issues in the Case and if judicially noticed will not advance the proceedings by any means at all – the principle justification for judicial notice.

(K) , (L), (S) & (Q) These are all contentious issues which are not appropriate for judicial notice especially as common words such as "armed men", "soldiers" "rebels" "junta" and "bandits" were commonly used indiscriminately by Sierra Leonean populace to describe alleged attackers and there were also loyal forces consisting of SLA, Ex-SLA, SSD, Policemen and Ex-Policemen and civilians fighting alongside with ECOMOG forces including informants and intelligence personnel.

(R) There could have been some form of cooperation or non-hostility between the AFRC and the RUF but to say that the RUF "joined" the AFRC implies a merger of

the two to make one distinct entity different from its components and the Defence submits that to be able to make such an assertion would require some knowledge of specific discussions or understanding as between the two groups, and that could not be a matter of common knowledge but would require insider knowledge.

(P) & (W) The Defence submits that these are contentious issues and not within the purview of judicial notice. It rules out the probability of factions emerging or splits, which the Defence submits characterized the actual relationship between the two groups rather than a continuation of an "Alliance".

(Y) However, active hostilities continued

The Defence submits that it is not common knowledge that active hostilities continued, but rather that the active hostilities resumed having regard to the intervening Peace Accords and cessation of hostilities.

(Z) 'At all times relevant members of ... armed attacks ... Districts'

That such attacks took place "at all times relevant to the Amended indictment is"controversial" and contested matter of serious and grave importance from the point of view of the Accused Kallon and seeks to uphold his right to confront his accusers and to cross-examine them on such allegations.

(AA), (BB), & (CC) These assertions constitute part of the elements of crimes charged in the Indictment and must therefore be subject to proof by the Prosecution at the Trial; and cannot therefore be proper subject matters to be judicially noticed.

20. **ANNEX B** – These documents are submitted for authenticity findings and admission in evidence as well to be judicially noticed. The Defence submits that the criteria for admissibility under Rule 89, and 92 *bis,* are relevance and additional safeguards, reliability and procedural fairness.

i. Relevance

Rules 89 (C) requires that proffered evidence must be "relevant". A showing of relevance requires more than a document itemizing scores of instruments relating to conflicts in Sierra Leone in the 1990's. The same failure to specify the connections

between the documents and the charges against the accused, which is fatal to the Judicial Notice Motion, also undermines the Prosecution's offer of the identical materials under Rules 89 and 92 bis.

ii. Additional Safeguards

Both Rules offer additional safeguards. The Special Court is required by Rule 89 (B) to employ evidence rules which "best favor a fair determination of the matter before it..." Rule 92 (C) *bis* requires a finding of reliability. The Prosecution offers only the most cursory and superficial arguments on the "reliability" or "fairness" of its offer and on such weak basis implores the Special Court to trample on the right of the Accused to a fair trial in respect of a blizzard of hearsay declarations.

21. The Defence respectfully submits that the Chamber may take judicial notice of the fact of the existence of the documents and the authenticity of Security Council Resolutions and official UN Documents and Peace Accords and Agreements between Governments, other than that, it is the Defence position that the contents particularly of Reports of the Secretary-General and NGO's, Government Pronouncements and the rest of the Documents in Annex B should not be admitted in evidence as requested for reasons that:-

i. The documents in this category concern events in Sierra Leone during the decade of the nineties. However, the Prosecution has advanced no arguments concerning the relevance of the documents to the indictment or the appropriateness of taking judicial notice of their contents. In addition to that the documents in **Annex B** are replete with "disputed" allegations concerning the RUF and its "high command" as well as unadorned legal conclusions. Of the twenty categories of documents, none more flagrantly violate the judicial notice criteria than Reports of Non-Governmental Organizations (Documents 30-47). Even the Reports of the Secretary-General and affiliated UN bodies cannot be said to be impartial as they are biased towards the commencement of litigation against the factions for alleged impunity[10]. The HRW "Getting Away" for example describes this same series of incidents beginning

[10] Fifth reports of the Secretary-General on the situation in Sierra Leone S/1998/486 of 6 June 1998 para 37 "It will remain important to document these actions with a view to tackling issues of impunity and as an element in the process of promoting reconciliation and healing of society".

January 6, 1999, charged in the Indictment attributing the conduct to the RUF and specifically claiming that these atrocities were planned at some level of the RUF "high command."[11] This appears to be a common feature in a majority of the documents sought to be judicially noticed or admitted in evidence.

ii. To judicially notice these document and deprive the Accused of the opportunity to challenge the contents would place more than a "chink" in his armor. It would render him not just without armour, but bereft of clothing, with no chance to defend himself.

CONCLUSION

The Defence therefore respectfully prays the Chamber to dismiss the Prosecution Motion except with respect to matters set out in Paragraph 18 above and the very cautious comments in Paragraph 21 on the existence and authenticity of certain documents.

Shekou Touray, Lead Counsel

Raymond Brown, Co-counsel

Melron Nicol-Wilson, Co-counsel

Date: 11th May 2004

[11] HRW "Getting Away", page 7 and 16