

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

NOTING the *Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence* ("Decision"), delivered by the Trial Chamber on the 2nd of June, 2004;¹

SEIZED OF the *Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice*, ("Motion") filed by the Defence for Fofana and the Defence for Kondewa (respectively the "Second Accused" and the "Third Accused") on the 7th of June, 2004, pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules");

NOTING the Response to the Motion filed on the 16th of June, 2004 ("Response") by the Office of the Prosecutor ("Prosecution") and the Reply thereto filed jointly by the Second and the Third Accused on the 22nd of June, 2004 ("Reply");

NOTING the Corrigendum to the Decision filed on the 23rd of June, 2004;

NOTING the *Decision on Defence Motion Requesting an Extension of Time within which to Respond to the Prosecution Motion's for Judicial Notice and Admission of Evidence* of the 30th of April, 2004;

NOTING the *Order Rejecting the Filing of the Defence Objection to Prosecution's Motion for Judicial Notice and Admission of Evidence* of the 5th of May, 2004;

MINDFUL of the provisions of Rule 7(C), Rule 73(B) and Rule 94bis of the Rules;

CONSIDERING the submissions made during the Pre-Trial Conference held on the 28th of April, 2004;

PURSUANT TO Rule 73(B) of the Rules;

HEREBY ISSUES THE FOLLOWING DECISION:

¹ See also Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 April 2004 ("Judicial Notice Motion").

I. SUBMISSIONS OF THE PARTIES

1. The Motion

1. Pursuant to Rule 73(B) of the Rules, the Second and the Third Accused seek leave to appeal the Decision on the basis of exceptional circumstances and irreparable prejudice arising from it.

2. Neither of the Accused objects to the legal reasoning or the criteria which the Chamber formulated to identify facts of common knowledge. According to the Accused, the Chamber in its Decision failed to take into consideration, the responses to the Judicial Notice Motion of the two Accused and in addition, erred in applying the criteria for the determination of facts and documents of common knowledge contained in Annex I and II to the Decision.²

3. The Second Accused submits that he did respond orally to the Judicial Notice Motion during the Pre-Trial Conference held on the 28th of April, 2004, accepting only some propositions of the Prosecution as facts of common knowledge. In addition, he clearly stated that he did not accept the contents of any of the documents but only the existence and authenticity thereof.³ The Third Accused wishes to draw attention to the propositions accepted in its response which the Chamber refused for late filing.⁴

4. According to both Accused, the facts listed in Annex I under A, D, H, K, L, M, and U of the Decision cannot be accepted as facts of common knowledge as they do not meet the prescribed criteria.⁵ Similarly, both Accused also submit that the nine Security Council Resolutions contained in Annex II of the Decision include disputable facts as well as legal findings and characterisations.⁶

5. In conclusion, both Accused submit that by failing to take into consideration their responses to the Judicial Notice Motion, the necessary exceptional circumstances were created to justify leave to appeal against the Decision. They further argue that if leave were not allowed, it would be impossible to avoid irreparable prejudice as the Chamber wrongly applied its own criteria for the determination of facts of common knowledge.⁷

² Motion, paras 3-7 and 23-24.

³ *Id.*, paras 8-10.

⁴ *Id.*, para. 11.

⁵ *Id.*, paras. 14-18.

2. The Response

6. In its Response, the Prosecution submits that the reasons provided in support of the Motion fail to establish the conjoint requirement of exceptional circumstances and irreparable prejudice to the Accused.⁸

7. The Prosecution argues that consideration of the oral response to the Judicial Notice Motion of the Second Accused would not have affected the conclusions reached by the Chamber and therefore, do not give rise to exceptional circumstances neither does the non-consideration of the response of the Third Accused, because both counsels had the opportunity to make timely and substantive submissions regarding the application of the law of judicial notice.⁹

8. In addition, the Prosecution further submits that taking judicial notice of facts that have legal consequences is permissible and those judicially noticed in the Decision do not prejudice the Accused. Any such fact which may be deemed to have legal consequences does not go to prove the guilt of the individual Accused, and that taking judicial notice does not prejudice the Accused but rather is in the overall interest of justice.¹⁰

3. The Reply

9. In their Reply, the Accused reiterate the arguments raised within the Motion. In particular, the Accused state that the Decision did not address the submission of the Second Accused and that this omission amounts to exceptional circumstances.¹¹

10. On the requirement of irreparable prejudice to a party, the Accused submitted that neither of the *ad hoc* Tribunals have taken judicial notice of facts which are elements of the crimes charged except where such facts were adduced in prior court proceedings before that tribunal.¹²

⁶ *Id.*, paras 19-22.

⁷ *Id.*, para. 23.

⁸ Response, paras 5 and 24.

⁹ *Id.*, para. 7-11 and 23.

¹⁰ *Id.*, para. 17.

¹¹ Reply, paras 3-5.

¹² *Id.*, para. 8.

II. THE APPLICABLE LAW

11. Rule 7(C) of the Rules provides thus:

Unless otherwise ordered by a Chamber or a Designated Judge, any response to a motion shall be filed within ten days. Any reply to the response shall be filed within five days.

12. The specific Rule governing the filing and determination of interlocutory appeals in the Special Court is Rule 73(B) of the Rules. It states that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

13. In its Decisions on the subject of interlocutory appeals in the RUF Case and in the AFRC Case, this Chamber outlined the principles governing applications of this nature. Emphasising that Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in exceptional cases, the Chamber further ruled as follows:

"[T]his rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive, not disjunctive; in other words, they must both be satisfied."¹³

14. In essence, as this Chamber emphatically noted in a subsequent Decision, in the test contained in Rule 73(B) the criteria of exceptional circumstances and irreparable prejudice are conjunctive. In this regard, the Chamber had this to say:

"[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals."¹⁴

15. Based on the foregoing restatement of the applicable principles of law, we now proceed to determine whether the Defence has established that there are both exceptional circumstances and that there would be an irreparable prejudice, warranting the granting of the Motion seeking leave to appeal against the Decision.

¹³*Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, and *Prosecutor v. Brima, Kamara and Kanu.*, Case No. SCSL-2004-16-PT, Decision on Prosecutor's Application for Leave to File and Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004.

¹⁴*Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-

III. THE MERITS OF THE APPLICATION

a. Introduction

16. The Motion is jointly premised on these following grounds:

(a) The Trial Chamber failed to take into consideration the response of the Second Accused and the untimely response of the Third Accused, which constituted exceptional circumstances to justify the appeal;

(b) If leave to appeal were not allowed, it would be impossible to avoid irreparable prejudice to the Defendants, as the Trial Chamber wrongly applied its own criteria for the determination of facts of common knowledge;

b. Exceptional Circumstances

17. The Third Accused, despite the rejection of an application for extension of time to respond to the Judicial Notice Motion, filed a response that has since been removed from the record of the case by a direct order of the Court.¹⁵ In that Order, the Chamber already enjoined the Third Accused that he was estopped from asserting any right to respond to the Judicial Notice Motion, such right having been extinguished by reason of non-compliance with the prescribed time limits for responses to motions.¹⁶

18. The Chamber therefore reiterates its finding that the Third Accused had no further right to file a response to the Judicial Notice Motion and rules that there is no merit in what it considers to be a specious claim that the failure of the Trial Chamber to take into consideration any such response would now constitute exceptional circumstance for granting leave to appeal against the Decision.

19. Consequently, having found that no exceptional circumstances have been shown by the Third Accused it is not necessary to address the question of irreparable prejudice in respect of him. The application from this Accused is therefore dismissed.

15-PT and SCSL-2004-16-PT, 1 June 2004, para. 21. See also *id.*, Decision on Application for Leave to Appeal Gbao - Decision on Withdraw Counsel, 4 August 2004, paras 34-40.

¹⁵ Kondewa - Order Rejecting the Filing of the Defence Objection to Prosecution's Motion for Judicial Notice and Admission of Evidence, 5 May 2004 ("Order").

¹⁶ *Id.*

20. With reference to the contention of the Second Accused, the Chamber, after having carefully reviewed the court's record of the Judicial Notice Motion and in particular, the timing of the filing of any submissions in connection thereto, notes that no written response was provided to the application and that the Second Accused presented an oral response during the Status Conference. Considering this background, the Chamber is of the opinion that it may not have given proper consideration to the oral Response of the Second Accused. The argument in rebuttal by the Prosecution that the failure to take a response into consideration would not have affected the Decision in unconvincing because it does not accord with due regard to the right of the Accused to a fair trial, and in particular, to present submissions in response to an application. The Chamber therefore rules that this does amount to exceptional circumstances which creates a basis for granting the leave sought to appeal.

21. Based on the finding that the application for the Second Accused has met the first arm of the test required for by Rule 73(B) of the Rules, the Chamber will now proceed further with the evaluation as to whether the second arm of the said test, namely the irreparable prejudice, has been satisfied.

c. Irreparable Prejudice

22. The doctrine of judicial notice is of fundamental importance in both national and international criminal law systems in that it significantly expedites the trial proceedings by dispensing with the need for a formal proof of issues patently indisputable and thereby fostering consistency and uniformity of decisions on factual issues where diversity in factual findings could be prejudicial to the principle of fundamental fairness.¹⁷ In order to qualify for judicial notice, the facts should firstly be relevant to the case against an accused person, should not be the subject of reasonable dispute, should not include any legal finding or characterization and, finally, should not attest to the criminal responsibility of an accused person.¹⁸

23. The second arm of the threshold test contained in Rule 73(B) is indeed a more complex one, requiring a determination that the a decision not only may result in a prejudice to the accused but also that such a prejudice is irreparable in that it may not be remediable by appropriate means within the final disposition of the trial.

¹⁷ Decision, paras 21, 23-24.

¹⁸ *Id*, para. 32.

24. Indeed, it is submitted by the Accused that such irreparable prejudice could or would result from the improper application within the Decision of criteria for the determination of facts of common knowledge unless it will be the subject of proper remediation through a further decision, as judicial guarantee, by the Appeals Chamber for which leave to appeal against an interlocutory ruling should be granted. Having reviewed the submissions made in this Motion, the Chamber finds that a resolution from the Appeals Chamber at this stage of the contentions in issue is indeed necessary to provide an appropriate judicial guarantee on the state of the contested findings of the Decision and in particular, on the application of the criteria for judicial notice laid down therein.

25. In addition, the Chamber is of the opinion that these submissions raise issues that are of a serious nature that justifies a decision by the Appeals Chamber which would serve the interests of justice by providing guidelines for the application of the principles relating to the doctrine of judicial notice.¹⁹

d. Conclusion

26. In conclusion, the Chamber dismisses the Motion in so far as it relates to the Third Accused on the grounds that it fails to meet the first arm of the prescribed test. The Chamber however, finds merit in the Motion in so far as it relates to the Second Accused on the grounds that it fulfils both arms of the prescribed test, noting that a determination by the Appeals Chamber of the issues raised in the grounds of appeal will not only serve the interests of justice but will, as already noted, contribute significantly to the jurisprudence on the doctrine of judicial notice in the sphere of international criminal law.

AFTER HAVING DELIBERATED, THE TRIAL CHAMBER



¹⁹ Decision on Application for Leave to Appeal Gbao - Decision on Withdraw Counsel, 4 August 2004, para. 57.



HEREBY GRANTS the Second Accused leave to appeal against the impugned decision but denied the Third Accused leave to appeal in respect of the same.

Done at Freetown this 19th Day of October, 2004

Pierre Boutet

Hon. Judge Pierre Boutet

Benjamin Mutanga

Hon. Judge Benjamin Mutanga
Itoe
Presiding Judge,
Trial Chamber

Bankole Thompson

Hon. Judge Bankole Thompson

