

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 16 June 2004

THE PROSECUTOR

Against

SAM HINGA NORMAN

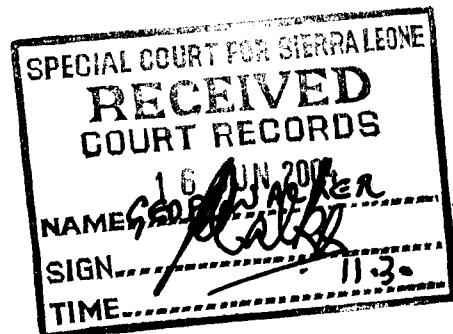
MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

**PROSECUTION RESPONSE TO “JOINT REQUEST OF SECOND AND THIRD
ACCUSED FOR LEAVE TO APPEAL AGAINST DECISION ON
PROSECUTION’S MOTION FOR JUDICIAL NOTICE”**

<u>Office of the Prosecutor:</u> Luc Côté James C. Johnson Charles A. Caruso	<u>Sam Hinga Norman</u> <u>Defence Counsel for Moinina Fofana:</u> Michiel Pestman Arrow J. Bockarie Victor Koppe <u>Defence Counsel for Allieu Kondewa:</u> Charles F. Margai Yada H. Williams Thomas G. Briody Susan Wright
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I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules, the Defence seeks leave to file an interlocutory appeal in respect of the “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”¹ (the “Decision on Judicial Notice”). The Prosecution files this response to the “Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution’s Motion for Judicial Notice” filed on 7 June 2004 (the “Application for Leave”).
2. In the Application for Leave, the Accused Fofana and Kondewa argue that the failure of the Trial Chamber to take into consideration the response of the Second Accused and the untimely response of the Third Accused to the Prosecution’s Motion for Judicial Notice gives rise to exceptional circumstances justifying granting leave to appeal. In addition, it is argued that the Defendant’s would be irreparably prejudiced if leave were not granted.

II. ARGUMENT

3. Rule 73(B) of the Rules states:

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.

4. The Trial Chamber’s “Decision on Prosecution’s Application for Leave to File An Interlocutory Appeal Against The Decision on The Prosecution Motions for Joinder”² (the “Decision on Interlocutory Appeal”) provides that:

As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber

¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, 2 June 2004.
² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT at paras. 8-15.

can exercise its discretion to grant leave to appeal. The two limbs to the test are clearly conjunctive, not disjunctive' in other words, they must *both* be satisfied. [Emphasis in original].

[P]rior to the amendment no possibility of interlocutory appeal existed and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.

It is clear from the plain reading of Rule 73(B) that granting leave is an exceptional option. As this is an exclusionary rule, if the two-limb test has been complied with, the [applicant] must demonstrate that there is something to justify the exercise of this discretion by the Chamber in its favour.

5. The Prosecution submits that the reasons provided in support of the Application for Leave fail to establish either exceptional circumstances or irreparable prejudice to the Accused Fofana and Kondewa.

III. EXCEPTIONAL CIRCUMSTANCES

6. Counsel for the Second Accused notes that an oral response was made to the Judicial Notice Motion during the Pre-Trial Conference on 28 April 2004 and that the Trial Chamber's Decision does not explicitly state whether or not it considered it. The Trial Chamber's legal reasoning and the criteria formulated to identify facts of common knowledge are accepted by the Accused; however, it is submitted that the Trial Chamber wrongly applied the criteria for the determination of facts of common knowledge as some of the facts and contents of documents judicially noticed are not facts of common knowledge.
7. In response, the Prosecution submits that non consideration of the oral 'response' does not, in this case, constitute exceptional circumstances and no authorities have been cited in support of this claim. Moreover, consideration of the Second Accused' oral response would not have effected the conclusions reached by the Trial Chamber and, therefore, does not give rise to exceptional circumstances. Counsel for the Second Accused had the opportunity to make substantive submissions respecting the application of the law and the criteria to the facts submitted for judicial notice and admission in either a written or

oral response. As noted, the Accused failed to file a written response and it is clear from the transcripts from the 28 April Pre-Trial Conference that it did *not* address the substantive nature of this issue orally.

8. In the Application for Leave, counsel for the Third Accused submits that, despite the untimely filing of their response,³ the Trial Chamber should have considered the propositions set out therein.
9. The Prosecution submits that considering the contents of the Objection would contravene both the “Decision on Defence Motion Requesting an Extension of Time within which to Respond to the Prosecution’s Motion for Judicial Notice and Admission of Evidence”⁴ and the “Order Rejecting the Filing of the Defence Objection to Prosecution’s Motion for Judicial Notice and Admission of Facts”⁵ rendering them meaningless.
10. In rejecting the filing of the Objection, the Trial Chamber noted “that Counsel for the Accused may file any statement of admissions or matters not in dispute at any time and that such an approach is encouraged by the Trial Chamber”. Counsel for the Third Accused did not file a statement of admissions or of matters not in dispute. Had the Third Accused done so, he would have alerted the Trial Chamber to facts not admitted and to matters in dispute. Since the Third Accused did not take advantage of this opportunity, he cannot, in the Prosecution’s submission, argue that the circumstances that now exist are in any way exceptional.
11. Since Counsel for both the Second and Third Accused had the opportunity to make timely and substantive submissions regarding the application of the law of judicial notice to the proposed facts, but did not, exceptional circumstances cannot be said to now exist.

³ *Prosecutor v. Norman, Fofana and Kondewa*, “Objection To Prosecution’s Motion For Judicial Notice And Admission Of Facts” SCSL-04-14-PT, 4 May 2004 (the “Objection”).

⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, 30 April 2004.

⁵ See *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, 6 May 2004.

IV. IRREPARABLE PREJUDICE

12. If exceptional circumstances were found to exist, Counsel for the Second and Third Accused has still failed to show that the facts judicially noticed by the Trial Chamber cause irreparable prejudice.
13. The Accused submits that statements A, D and H and some of the Security Council Resolutions include legal findings or characterizations which disqualify them as constituting facts of common knowledge.
14. The Trial Chamber, having taken judicial notice of the fact that Sierra Leone acceded to the Geneva Conventions of 12 August 1949 and Additional Protocol II to the Geneva Conventions on 21 October 1986 (fact E), was free to judicially notice that the Accused and all members of the organized armed factions in Sierra Leone were required to abide by these laws (fact D). The Application for Leave does not indicate how this fact causes irreparable prejudice to the Accused and the Prosecution submits that, in any event, is an untenable argument.
15. The characterization of the CDF as an “organized faction” and the situation in Sierra Leone as an “armed conflict” are facts beyond reasonable dispute which have legal consequences, but this does not preclude them from being facts of common knowledge. That these facts are necessary requirements for determining liability for some of the crimes described in the Statute for the Special Court, does not prevent the Trial Chamber from taking judicial notice of them.
16. With regard to fact (A) the Prosecution points out that, in contrast to what is stated in the Application for Leave in paragraph 11, the Third Accused in the rejected Objection did not dispute that there was an armed conflict in Sierra Leone, only the date on which the armed conflict ended.
17. In summary, taking judicial notice of facts that have legal consequences is permissible and those judicially noticed do not prejudice the Accused, much less irreparably. Any such facts which may be deemed to have legal consequences do not go to prove the guilt of the individuals Accused, thus

taking judicial notice of them does not prejudice the Accused but rather is in the overall interest of justice.

18. The Accused submit that facts K, L, M and U and the Resolutions are not facts of common knowledge as they are subject to more than reasonable dispute and that, therefore, taking judicial notice of these would infringe upon the Defendants right to a fair trial and seriously undermine the presumption of innocence guaranteed by Article 17 of the Statute.
19. The Prosecution notes that the determination of whether or not a fact is one of common knowledge is, as the Trial Chamber determined, “the subject of subtle legal interpretation”⁶.
20. The Accused take issue with the judicial notice of their respective positions within the CDF, as set out in facts (L) and (M). Since judicially noticing the positions of the Accused does not, in and of itself, engage criminal responsibility pursuant to either Article 6.1 or Article 6.3 of the Statute, the taking of judicial notice of these facts is appropriate and does not give rise to an irreparable prejudice.
21. The Application for Leave does not make substantive references to the manner in which facts (K) and (U) cause irreparable prejudice to the Accused and, as such, the Chamber has no basis to conclude that any prejudice has been established. Moreover, the Accused Norman, in his Pre-Trial Brief, admits that “the Accused Sam Hinga Norman during the temporal jurisdiction of the Court at the dawn of the 1997 AFRC putsch was appointed Coordinator of the Civil Defence Forces and doubled as Deputy Defence Minister.”⁷
22. Apart from objecting to two examples of content in two different Resolutions, the Accused do not provide reasons why the judicial notice of the Resolutions, in and of themselves, causes irreparable prejudice and so the Chamber has no basis to conclude that irreparable prejudice has been made out.

⁶ *Supra*, note 1 at para. 26.


⁷ *Prosecutor v. Norman, Fofana and Kondewa*, “Defence Pre-Trial Brief Pursuant to Revised Order for the Filing of Pre-Trial Briefs (Under Rules 54 and 73 *bis*) of 22 March 2004” SCSL-04-14-PT, 31 May 2004.

V. CONCLUSION

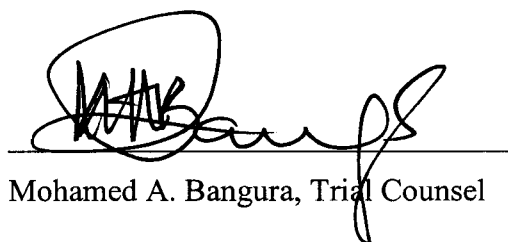
23. The Accused Kondewa, having failed to submit a timely response to the Trial Chamber, and the Accused Fofana, having failed to make substantive submissions regarding the law of judicial notice and its application, now dispute the determinations made by the Trial Chamber. The Prosecution submits that a failure on the part of the Accused to take advantage of its opportunity to respond substantively can not subsequently give rise to exceptional circumstances required for leave to appeal.
24. In conclusion, the Prosecution submits that the reasons provided in support of the Application for Leave fail to establish either exceptional circumstances or irreparable prejudice to the Accused Fofana and Kondewa and, as a result, the conjunctive test that must be established in order for leave to be granted has not been made out; therefore, the Application for Leave should be dismissed.

Done in Freetown, on this 16 day of June 2004.

For the Prosecution,



Luc Côté, Chief of Prosecution



Mohamed A. Bangura, Trial Counsel