

SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
 Judge Benjamin Mutanga Itoe
 Judge Pierre Boutet
 Registrar: Robin Vincent
 Date: 22 June 2004

THE PROSECUTOR**Against****SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA**

CASE NO. SCSL-2004-14-T

MOININA FOFANA, ALLIEU KONDEWA
JOINT REPLY TO "PROSECUTION RESPONSE TO JOINT REQUEST OF
SECOND AND THIRD ACCUSED FOR LEAVE TO APPEAL AGAINST
DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE"

Office of the Prosecutor:

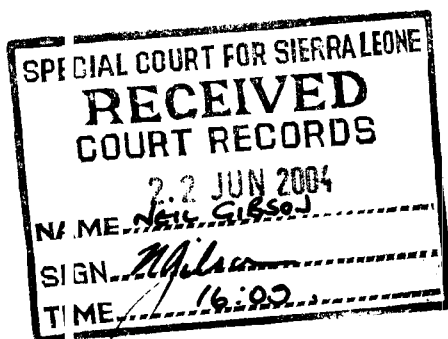
Luc Côté
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Defence Counsel for Moinina Fofana:

Michiel Pestman
 Arrow J. Bockarie

Defence Counsel for Allieu Kondewa:

Charles Margai
 Susan Wright



CASE NO. SCSL-2004-14-T

1

Introduction

1. The Defence for Mr. Moinina Fofana and Mr. Allieu Kondewa (the “Defence for the Second Accused” and the “Defence for the Third Accused”) hereby file their reply to the “Prosecution Response to Joint Request of Second and Third Accused for Leave to Appeal against Decision on Prosecution’s Motion for Judicial Notice” (the “Reply”, the “Response” and the “Request” respectively).
2. The Response does not necessitate a lengthy reply since it is respectfully submitted that it is simply a denial of the submissions in the Defence’s Request. The Defence for the Second and Third Accused will therefore confine themselves to the following, without any implied agreement on any of the points raised by the Prosecution to which the Defence for the Second and Third Accused do not respond.
3. In relation to the claim of exceptional circumstances, the Prosecution, first of all, seems to try to cast doubt on the Defence submission that the Trial Chamber in its “Decision on Prosecution’s Motion for Judicial Notice” (the “Decision”) did not consider the oral submissions of the Defence for the Second Accused. However, the Trial Chamber in paragraph 32 of its Decision clearly stated that no response was filed on behalf of Accused Fofana. It is clear, furthermore, from paragraphs 9 to 12 of the Decision, that the Trial Chamber only addressed the submissions of the First Accused.
4. The Prosecution also appears to dispute that such an omission could constitute exceptional circumstances, as submitted by the Defence for the Second Accused. The reason that the Defence for the Second Accused did not cite any authorities to support this submission is of course that there is no jurisprudence on this point from the ICTR and ICTY, as the exceptional circumstance criterion in Rule 73(B)

of the Rules of Procedure and Evidence is unique to the Special Court for Sierra Leone. It remains the Defence's respectful submission that the non-consideration of a Party's arguments, properly made, does constitute an exceptional circumstance.

5. Secondly, the Prosecution seems to claim that the failure to consider the oral response of the Defence for the Second Accused could not constitute exceptional circumstances in any event because "consideration of the [...] oral response would not have effected [sic] the conclusions reached by the Trial Chamber",¹ and because this response "did not address the substantive nature of [the] issue".²
6. The Prosecution could only rely on the first argument if it were able to say that even if the Trial Chamber had agreed with the Defence its Decision would have been the same. This is clearly not the case here, as the Trial Chamber took judicial notice of a number of "facts" to which the Defence for the Second Accused had orally objected. The Defence for the Second Accused is unsure what the Prosecution means by the "substantive nature" of the application of the law of judicial notice. However, it reiterates that it made clear that it did not accept that a number of the Prosecutions propositions could constitute "facts of common knowledge", and this (the *application* of the criteria) forms the basis of the appeal.
7. The Prosecution urges an interpretation of the language in the Trial Chamber's denial of the Third Accused's objection which would make the Third Accused's failure to file a timely objection tantamount to an admission of that which he could have denied had he filed a timely objection.³ While the Prosecution is right to point out the failure of the Second Accused to so timely file, a failure which

¹ Response, para. 7.

² *ibidem*.

³ Response, para. 10.

falls squarely upon counsel, accepting this interpretation would seriously undermine the presumption of innocence which is conferred on all accused.⁴


8. With regard to irreparable prejudice, the Defence for the Second and Third Accused reiterate that the “facts” of which the Trial Chamber has taken judicial notice irreparably prejudice the cases of both Accused as they not only include crucial allegations against them, but also elements of the crimes with which they are charged, “facts” the Defence for the Second and Third Accused intended to dispute at trial. By application of judicial notice, it will now be impossible for the Defence to dispute them at trial.
9. Without recounting it in detail, the Defence for the Second and Third Accused respectfully draw the Trial Chamber’s attention to the jurisprudence referred to in its Request and highlight the fact that neither ad hoc tribunal has 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. The Defence for the Second and Third Accused respectfully reiterate that they are irreparably prejudiced by the findings of the Trial Chamber.
10. In conclusion, the Defence for the Second and Third Accused maintain that they have met the high threshold for leave to appeal set by the Trial Chamber in its jurisprudence,⁵ and that the Trial Chamber should exercise its discretion to grant leave to appeal.

⁴ See, e.g. Statute of the Special Court for Sierra Leone, Article 17.

⁵ See e.g. Trial Chamber, Prosecutor against Issa Hassan Sesay *e.a.*, SCSL-2004-15-PT, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder, 13 February 2004, paras. 8-15.


Done in Freetown, this 22nd day of June 2004

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