SPECIAL COURT FOR SIERRA LEONE

Trial Chamber 1

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

Registrar: Robin Vincent

Date: 28 June 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL -04-14-T

DEFENCE REPLY TO PROSECUTION RESPONSE TO ITS LEAVE REQUEST TO APPEAL AGAINST TRIAL CHAMBER 1's CONSEQUENTIAL NON-ARRAIGNMENT ORDER FILED 18 MAY 2005.

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I. PROSECUTION ARGUMENTS

1. In the **Prosecution Response** (SCSL-2004-14-T, #438 at RP.13099-13103 of 23/06/2005) to the Defence Request for Leave to Appeal Against the Consequential Non-Arraignment Order of Trial Chamber 1, 18 May 2005 (**the Defence Leave Request,** #431 at RP. 13016-13025), the Prosecution advances at least four basic arguments, howsoever inchoate or rudimentary they may be, as follows:

   i). That the Appeals Chamber (**the AC**), in its Decision on Amendment of the Consolidated Indictment of 18/05/2005 (**the Appeals Amendment Decision**, #397 at RP. 12652- 12685), did not contemplate further appearance or re-arraignment of the First Accused , contrary, says the Prosecution, to the Defence submission that the AC so did. That if the AC had contemplated such further appearance or re-arraignment, "it would not have given the Trial Chamber a discretion in the matter. It would simply have ordered the Trial Chamber to do so" (paras. 2, 6 of #438).

   ii). That the Consequential Order on Amendment of the Consolidated Indictment (**the Consequential Order**, #408 of 25/05/2005 at RP. 12899-12902) made by Trial Chamber 1 (**the Chamber** or **TC 1**) does not violate the rights of the First Accused, presumably as to arraignment or re-arraignment, because of the Appeals Chamber's opinion to the following effect:

   > "Amendments that do not amount to new counts should generally be admitted, even at a late stage, if they will not prejudice the Defence or delay the trial process. The submissions before us indicate that they will not have either effect" (para. 87 of #397. See para. 8 of #438).

   iii). That the Defence Leave Request in #431 does not meet any of the criteria under Rule 73(B) of the Rules of Procedure and Evidence (**the RPE**) of the Special Court for Sierra Leone (**the SCSL**) for an

application for leave to appeal against an interlocutory decision of a Trial Chamber, in that, as the Prosecution argues, "no exceptional circumstances exist in this case nor has the First Accused **suffered irreparable prejudice**" (para. 4 of #438; emphasis added).

iv). That the Consequential Order, being an Order made in the Chamber's discretion, "**may only be impugned upon a showing that the Learned Justices abused their discretion**"; and that since the Defence Leave Request "does not allege any abuse of discretion," the Consequential Order was beyond the pale of a request for leave to appeal or indeed beyond that of intervention by the Appeals Chamber (para. 7 of #438; emphasis added).[1]

II. DEFENCE REPLIES.

2. Since the Prosecution Response seems to be not so clearly aware that the DefenceLeave Request is **not** seeking to appeal against **the entirety of** the Consequential Order, it should be emphasised here at the outset that the said Request is being made specifically "for leave to appeal **against the non-arraignment order**" alone, which forms part thereof (para. 2 of #431; emphasis added), and not against the whole of it, as seems presumed in parts of the Prosecution Response (See paras. 2, 3, 7-9 inclusive of #438). The specific arguments of the Prosecution may thus be countered now.

i). Whether Appeals Chamber Contemplated Re-Arraignment.

3. The Prosecution assertion that if the AC had contemplated re-arraignment of the First Accused it would "simply have ordered the Trial Chamber to do so" (see paras. 2, 6 of #438 and para. 1(i) hereof above), completely misconceives

[1] The authority cited in support of this argument is from *Prosecutor v. Bagosora et al.*, "Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO", ICTR-98-41-T, 11 December 2003, para. 8.

the AC's own expressed attitude towards areas of Trial Chamber discretion, to wit, its general avoidance of "second guessing Trial Chamber decisions that are essentially discretionary ", unless of course "exceptionally" as part of its appellate function in cases where the Trial Chamber itself has expressly and properly granted leave for a matter "to be referred to this Chamber for resolution"(see para. 87 of #397). Accordingly, even if the AC contemplated re-arraignment in the relevant circumstances here, it would hardly have made an express order to the effect, even though it would still remain appropriate for others to draw reasonable inferences or implications to that effect from its findings and its interpretations of specified Rules, as is properly inferred or implied (it is respectfully submitted), for example, by the Defence in para. 13 of #431 and by the Dissenting Judge in paras. 59-60 of his Dissenting Order of 8 June 2005 (SCSL-04-14-T in #428 at 12988-13009).

ii). Rights Violation and AC's Views on Amendments.

4. The AC's views on the appropriateness of accepting "even at a late stage" those amendments "**that do not amount to new counts**" (see para. 87 of 397; emphasis added), as cited by the Prosecution in para. 8 of #438 and set out in para. 1(ii) hereof above, have no relevance or applicability whatsoever to the alleged violation of the right of the First Accused to re-arraignment. For the said right is claimed only in respect of the diametrically opposed set of amendments, to wit, those which the AC itself variously categorically acknowledges as "new allegations", or "added material elements", or "new charges,", or "new counts", all of which do "amount to serious charges of criminality" against the First Accused and which did not appear in the previous separate individual indictment against him (See paras. 72, 74, 76, 79 (iii), 80, 84-86 of #397).

(iii). Non-compliance with SCSL Rule 73(B).

5. The Prosecution observation that "no exceptional circumstances exist in this case" (para. 4 of #438) is a bland assertion arising from no analysis whatsoever, not even by mere reference to the "exceptional circumstances" cited by the Defence in para. 14 of #431. It should also be pointed out that the second criterion in Rule

73(B) of RPE/SCSL concerns the need to "avoid" irreparable prejudice, and not necessarily the fact of having "suffered", as the Prosecution loosely asserts in para. 4 of #438. The Prosecution objections on the basis of the two categories of the Rule 73(B) criteria are thus of no moment whatsoever.

(iv). Judicial Abuse of Discretion as Basis for Rule 73(B) Leave.

6. The authority cited in para. 7 of the Prosecution Response (#438) as set out in para. 1 (iv) and Footnote 1 hereof above is grossly misapplied in this case, in that it was evolved in respect of the ICTR Rule 73(B) whose criteria are completely different from the SCSL Rule 73(B). Whereas the criteria for SCSL Rule 73(B) reside in the stipulation "exceptional circumstances and to avoid irreparable prejudice to a party", those of ICTR Rule 73(B), as amended on 23/04/2002, are concerned with "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the appeals Chamber may materially advance the proceedings"[2]. Jurisprudence in respect of such radically different rules may thus not be bandied or switched from one to the other without due regard to the context and the said differences of criteria. For the purposes of SCSL Rule 73(B), with its far more objectively oriented criteria than those of the ICTR variant, abuse of discretion by learned Trial Chamber Justices is not an essential pre-condition for leave to appeal thereunder.

III. CONCLUSION

7. In view of the foregoing analysis and considerations, it is submitted that the Prosecution Response fails to effectively challenge the submissions in the Defence Leave Request. The learned Honourable Justices of Trial Chamber 1 are accordingly hereby urged to grant the First Accused the reliefs prayed for in paras. 2 and 15 in particular of the Defence Leave Request in #431. And

[2] Ibid, para. 6. See also Jones & Powles, *International Criminal Practice*, 3rd ed. 2003, at p. 686, para. 8.5. 471, where the said new system is described as "has not yet been tried and tested".

preferably, the non-appellate aspect of the said reliefs; but failing which the leave to appeal should be graciously granted.

Done in Freetown this 28th day of June 2005.

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