SCSL-2003-05-PT-067
(1386-1343)

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067

SPECIAL COURT FOR SIERRA LEONE

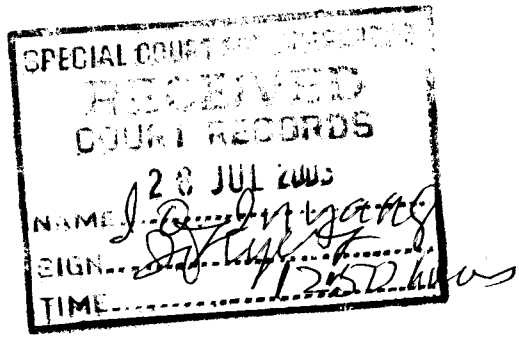
CASE NO. SCSL-2003-05-PT

IN THE TRIAL CHAMBER

Before: Judge Thompson
Judge Itoe
Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: July 28, 2003



THE PROSECUTOR

v.

ISSA HASSAN SESAY

DEFENCE REPLY TO THE PROSECUTOR'S RESPONSE TO THE DEFENCE PRELIMNARY MOTION CONCERNING DEFECTS IN THE INDICTMENT

Office of the Prosecutor

Luc Cote, Chief Prosecutor
Robert Petit, Senior Trial Counsel
Sharan Parmar, Assistant Trial Counsel

Counsel for the Accused

William Hartzog, Lead Counsel
Wayne Jordash, Co-counsel

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INTRODUCTION

1. 1.Undersigned Defence Counsel sent a memo to the Court Management Unit, the Prosecution and the Defence Office prior to departure from Canada on Sunday, July 6th, 2003, outlining his travel plans for arrival to the Special Court on July 12th, 2003, a Saturday, and requesting that any time limits for replying, responding or filing motions be suspended until his arrival in Freetown as he had no foreseeable access to the internet from the time he left Montreal, continued from Paris through London, England for meeting with contracted assistants and prospective Counsel and transited via Paris to Freetown.

2. Counsel cannot work on advancing the file during travel to the court. Counsel has not missed any delay to date, however, prior to the instant Motion he had requested an extension of time to file Preliminary Motions and a subsequent Motion for Suspension of the Time Limits to file Preliminary Motions (both under deliberation).

3. Counsel searched his e-mail <whartzog@waxmandorval.com> for evidence of confirmation that the Prosecutor's Response in the instant Motion was filed and served and continued, erroneously, to believe that no Response had been filed within the time limits. Counsel additionally checked his computer and lotus notes in the SCSL computer in his office every day since the day of his arrival in Freetown, noting that various annexes bearing the number SCSL-2003-06-PT were sent to his SCSL address hartzog@uun.org but never found any Response from the Prosecutor. On Wednesday, July 23, 2003 counsel found the Response not in his e-mail account but on the Bulletin Board and realized that the Response did exist. Then counsel went to the Court Records office where Mr. Joseph Massaquoi confirmed that the Response had been sent to his home e-mail <whartzog@waxmandorval.com> on July 7, 2003 while counsel was travelling and during the time counsel had advised the Court Records Office that he would be unable to read e-mail during his travel to the Court. In the event, it appears that <whartzog@waxmandorval.com>, might possibly not have received the electronic service as it did not appear in counsel's e-mail inbox. As a preventative measure counsel suggests that all Court Records electronic service require a confirmation of receipt upon opening the e-mail.

4. Counsel is now filing within three (3) days of service (reception on July23rd. 2003 in the circumstances) of the said Response; as the third day was a Saturday, counsel is filing Monday morning, July 28th, 2003.

PARAGRAPH 3 OF THE PROSECUTORS RESPONSE

5. The defence submits that the prosecutors attempt to interpret their obligations pursuant to Rule 47 (c) of the Statute of the Special Court (hereinafter the Statute) and the annexed Rules of Procedure and Evidence as less onerous

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than those contained within the corresponding rules of the ICTR and the ICTY [12]should be resisted.

6. The interpretation, as contained in paragraph 3 of their response is not supported by the ordinary applicable rules of statutory interpretation or jurisprudence. Whilst the wording of Rule 47(c) of the Statute is different there is nothing to support the contention that the phrase "a short description of the particulars of the offence" was intended to be read as providing the accused with less than the minimum guarantees than the corresponding rules at the ICTR and the ICTY.

7. The obligations which arise in both cases must be interpreted to define the minimum requirements of any indictment and should, in any event, demonstrate "that the accused allegedly committed the crime" (1) and to thereby provide the accused with the particulars "necessary in order for the accused to prepare his defence and to avoid prejudicial surprise" (2)

8. The defence accept that the Statute does "not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines of our sister Tribunals" (see para 6 of the prosecution response) but nevertheless the elucidation of minimum guarantees within the jurisprudence of the ICTY and ICTR is instructive and should be followed.

9. The prosecutions reliance upon the alleged difference between Rule 66(A) (ii) of the Rules and Procedure at the ICTR and the ICTY and Rule 66(A)(i) as providing support for their interpretation of the requirements (see paragraph 5 of their response) is misconceived and plainly wrong. The prosecution should have compared Rule 66(A) (i) of the Statute with Rule 66(A) (i) of the ICTR and the ICTY and thereafter Rule 66(A) (ii) with the corresponding rules of the ICTY and the ICTR. The provisions are the same in each case and distinguish between the obligations to serve supporting materials and witness statements; a distinction that the prosecution erroneously fail to appreciate.

10. In any event the pertinent jurisprudence indicates that witness statements ought to be disclosed to the defence "as far in advance of the trial as possible"[3] and thus ultimately the safeguards which are implicit in the identical provisions of Rule 66(A) of the ICTR and ICTY should be accorded to the accused. In other words the requirements of Rule 66(A) impact upon the prosecutions obligation to provide specificity and particularisation of the

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1.Prosecutor v Delalic, Decision on Motion of the Accused Delic based on Defects in the Form of the Indictment October 2, 1996

[2] Prosecutor v Delalic, Decision on the Accused Mucic's Motion for Particulars, June 26, 1996 Para 9

[3] Kordic and Cerkez, Order On Motion to Compel Compliance by Prosecution with Rules 66(A) and 68, Feb 26, 1999

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indictment to the same degree in all three (3) Tribuunals and, as they concede in paragraph 5 of their response, the impact of Rule 66(A) is at best minimal.

11. The defence further submits that, even if, which it does not accept, Rule 47(c) of the Statute provides the defence with less safeguards than those that have been recognised at the ICTR and ICTY as providing minimum guarantees, the indictment is nevertheless deficient and breaches the rights of the accused pursuant to Article 17(4) (a) of the Statute.

12. The defence therefore repeats the totality of its submissions contained within its motion of the 23rd June 2003.

THE SPECIFICITY OF THE INDICTMENT

13. The defence submissions rest upon an assessment of the indictment as a whole. Unfortunately little information or elucidation is to be gained from the generalities which form the substance of the indictment except insofar as they provide some context for the crimes alleged but do not elucidate the alleged involvement of the accused. In particular the indictment fails in each and every case to provide the accused precisely (or at all) with details of his alleged mode of participation in the generalised crimes detailed within the indictment. The form of the alleged participation is a material averment which should, irrespective of the contextualising paragraphs provided, be clearly laid out in an indictment in order to clarify the prosecution case [4].

14. Whilst it is accepted that the degree of specificity required depends upon the proximity of the accused to the particular events pleaded (see paragraph 9 of the prosecutor's response) it is essential for the accused to know from the indictment what proximity is alleged. The true nature of the responsibility of the accused for the events pleaded is an essential material fact to be pleaded in the indictment. [5]. It is submitted that the indictment is so deficient it does not provide this information. The fact that the accused may have held certain command positions within the RUF at a time of international humanitarian crimes provides little or no real indication of his alleged proximity to the specific crimes therein.

15. Moreover the prosecution concede in paragraphs 30 – 31 of their response that they are in a position to provide further details in a Bill of Particulars. It is submitted that in light of this concession (that they have the requisite details) they should provide the same to the accused and identify within the indictment

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[4] Prosecutor v Dosen & Kolundzija, Case IT – 95 – 8 – PT, Decision on Preliminary Motions, 10th February 2000, para 12

[5] Ibid, para 13

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the methods of the alleged commission of the crimes, or the manner in which they were committed. [6]

SPECIFICITY OF NAMES OF INDIVIDUALS AND PLACES AND TIME PERIOD.

16. Whilst the prosecution have pleaded in broad terms the relationship between the Accused and the overall groupings (RUF, ARFC and the ARFC/RUF) it fails to provide sufficient further detail to allow the accused to know within those overall broad groupings who is alleged to have directly committed the crimes and who is responsible for the particular events described.

17. The accused ought to be informed of those engaged in the enterprise at any given location and time period at least by reference to their category as a group [7]. It is submitted therefore that the prosecution should provide, if known, the identities of the further persons said to have been either acting in concert with him and/or acting subordinate to him. It is insufficient to merely provide the overall groupings as stated above.

18. In particular the specific command structure, presumably those responsible for crimes alleged and who were subordinate to the accused, ought to be clarified. In addition if the prosecution seek to limit the persons engaged in the joint criminal enterprise to those persons named in paragraphs 8, 20, 21 and 22 of the Indictment this should be made explicit.

19. The prosecution must provide sufficient information to allow the accused to know the relationship between himself and the others alleged to have done the acts for which he is to be held responsible and the conduct of the accused by which he may be found to have known or had reason to know that the acts were done, or had been done, by those others, and to have failed to take the necessary measures to prevent the acts or punish the persons who did them. In the absence of information identifying, at the very least named subordinates (within the overall generic groupings of the RUF and AFRC) and the full complement of his alleged superiors (see paragraph 21 of the indictment for the phrase, "other superiors") responsible for planning, instigating, ordering, committing or otherwise aiding or abetting the specific acts, the accused is unable to ascertain his proximity to the events and/or his defence to them.

CO –ACCUSED AND PERPETRATORS

20. Where it is not alleged that the accused personally did the acts for which he is to be held responsible and the prosecution seek to rely upon a joint criminal enterprise the indictment should make this clear.

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[6] Prosecutor v Brdanin & Talic, Case IT – 99 – 36 – PT, Decision on objections by Radoslav Brdanin to the Form of the Amended Indictment, 23 February 2000. para 10

[7] Ibid, para 20

21. Additionally it is resubmitted that, in relation to each and every count of the indictment the general formulation "Members of the AFRC/RUF subordinate to or acting in concert with" even when read in light of the persons named (the co –accused) provides an incomplete description of the alleged perpetrators known to the prosecution. The defence re – iterates its submission that information known to the prosecution ought to be pleaded in the indictment.

VICTIMS

22. The defence are unable to ascertain which "humanitarian assistance workers" have been attacked and where the attacks are alleged to have taken place (see paragraph 58 of the indictment). It is therefore not possible to ascertain the acts alleged or to know which events are relied upon and consequently to know the alleged conduct of the accused by which he may be held to be responsible. This lack of specificity is particularly significant in light of the open ended particularisation of the named locations within paragraph 58 of the indictment. The defence respectfully reminds the Trial Chamber that the obligations placed upon the prosecution to provide greater specificity relating to the acts of other persons is greater than that for superior responsibility. (8)[8].

LOCATION AND TIME PERIOD

23. The prosecution concede that Sierra Leone is a small country. It is submitted therefore that it would be practicable to provide specificity as regards named villages and/or towns which were the subject of attack and greater precision of the time of the attacks.

24. It may be, although this is not conceded, that some of the paragraphs within the indictment which purport to identify the criminal acts committed which support the counts on the indictment, are sufficiently particularised. However, in the absence of information to ascertain the accused's proximity to those events and/or any detail of his specific conduct by which he may be found to have participated pursuant to Article 6(1) and 6(3) of the Statute the defence are unable to make this concession in relation to the location and time periods specified (9)[9].

25. The defence submit that paragraph 51 does not, due to the overall breadth of the pleading and the failure of the prosecution to particularise his mode of participation, allow the accused to know his proximity to the events alleged.

JOINT CRIMINAL ENTERPRISE

26. It is submitted that the assertion that Mr Sesay occupied certain positions within the RUF, without more, does not elucidate the nature of his alleged role

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[8] Ibid, para 20

[9] Prosecutor v Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, Feb 11, 2000

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in the common plan. Instead it merely places him within the RUF command structure at times when crimes were allegedly committed. Thus the prosecution fail to provide clarification of his alleged acts which link him to the common plan. In other words the alleged nexus between his alleged place within the command structure of the RUF and the means by which his actions contributed to the criminal acts (which formed the means by which the common plan was executed) is not specified. In these circumstances the indictment fails to explain at all how his role; his acts and the common plan are linked, if at all.

FORMULATION OF COUNTS IN THE INDICTMENT

27. The defence submits:

    a. The use of the words "included" and "in particular" indicates that the prosecution are able to provide specific detail of the offences sought to be described. It is submitted therefore the detail should be provided.

    b. The pleading of the overall plan provides no assistance in this regard; merely contextualising but not particularising the specific acts alleged.

    c. The prosecution in paragraph 23 of their response appear to concede that the use of the phrases (as quoted above) provide an opportunity to unfairly introduce evidence on events outside the framework of the indictment. In these circumstances the defence should not have to rely upon the Statute and the Rules of the Special Court, at some time in the future, to prevent the expansion of the indictment, if that possibility can be prevented at this stage. The phrases serve no purpose and therefore should be, at the very minimum, edited.

28. Finally it is submitted that, notwithstanding the alleged "massive and widespread" nature of the case (see paragraph 24 of the prosecution response) and the accused's alleged high level authority which gives rise to his liability the accused still requires to know:

    a. whether it is alleged that he personally committed the acts alleged;

    b. his precise proximity to the acts, not said to have been committed personally;

    c. his precise mode of participation, even if that is pleaded in the alternative.

29. The requested level of precision is important, if only, in order to demonstrate the impossibility of being held responsible both directly and indirectly for those of his subordinates (10)[10].

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[10] Prosecutor v Blasic, Case IT – 99 – 36 – PT Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form thereof 4 April 1997 para 32.

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CHARGING 6(1) AND 6(3)

30. It is not possible to ascertain, in the absence of the specificity requested to know whether the conditions of cumulative charging as defined in the Prosecutor v Kupresic, Decision on Defence Challenges to Form of the Indictment, May 15, 1998, are satisfied and whether two convictions are required for both offences to describe what the accused did. The defence thus re –iterate their objections to the charging of both 6(1) and 6(3).

PRAYER

Counsel respectfully prays for the Court's understanding of the exceptional circumstances leading to the delayed filing of the instant reply.

Counsel respectfully prays that the Motion for Defects in the Indictment be granted, in accordance with the Prayer in the said Motion and the arguments presented in the instant Reply.

Freetown, 28th day of July 2003.

For Mr. Issa Hassan Sesay William Hartzog, Defence Counsel	Wayne Jordash, Co-Counsel