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SCSL-2003-05-PT.
(1706-1719)

1706

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:
Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: November 18, 2003

The Prosecutor

-v-

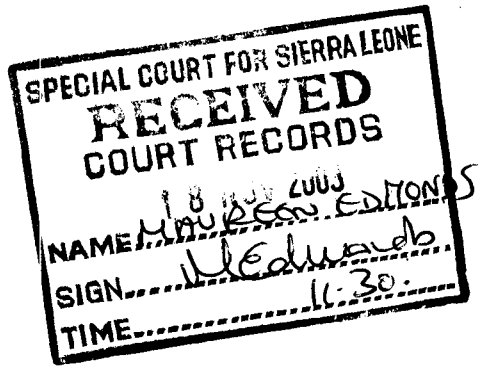
Issa Hassan Sesay

Case No: SCSL - 2003 – 05 - PT

DEFENCE RESPONSE TO PROSECUTION MOTION FOR JOINDER

Office of the Prosecutor
Luc Cote, Chief of Prosecutions
Robert Petit, Senior Trial Counsel
Sharan Parma, Assistant Trial Counsel

Defence Office Sylvain Roy
William Hartzog, Lead Counsel
Wayne Jordash, Co- Counsel
Abdul Serry Kamal, Co-Counsel



INTRODUCTION

1. The defence herein respond to the Prosecution Motion for Joinder filed on the 9th October 2003 (hereinafter the Joinder Motion) requesting pursuant to Rule 48 of the Rules of Procedure and Evidence (hereinafter the Rules) that the Accused, Issa Sesay be tried jointly with Kallon, Brima, Gbao, Kamara and Kanu.

2. The defence response (hereinafter the Response) is served without prejudice to the Defence Motion filed on the 21st day of October 2003) to request that the time limit for Response to the Prosecution Motion for Joinder commence upon the Receipt of *inter alia* the modified or particularised indictments of the proposed co – accused. It is not conceded that the defence are, without the requested modification or particularisation, able to properly consider (and thereafter respond) to the question of whether joinder is in the interests of justice. In the event that the prosecution seek to amend or further particularise the indictments served to date the defence reserve the right to amend the written (or intended oral) submissions herein.

3. Further the Response is filed without prejudice to the accused rights pursuant to Rule 72 of the Rules (particularly Rule 72(B) (iii)) and Rule 82(B).

THE LAW: generally

4. The defence agree that Rule 48(B) of the Rules empowers the Trial Chamber, to grant leave for persons, separately indicted, to be tried together, if the crimes alleged against each were committed in the course of the same transaction (hereinafter the "Transaction Test"). The defence agree with the prosecution insofar as they state in paragraph 15 of the Joinder application, that the Trial Chambers discretion, is subject at all times to the interests of justice and the rights of the accused (see The Prosecutor v Bagosora, ICTR – 96-7).

5. It is submitted that considerations which relate to the administration of justice need to be balanced against the right of the accused to a trial without undue delay and any other prejudice that may be caused by joinder (see Prosecutor v Bagosora and others, Decision on the Prosecutor's Motion of Joinder, ICTR Trial Chamber, 29 June 2000, paras 145 – 156). It is respectfully submitted that, whilst issues which might properly be termed "administrative" can (and in certain circumstances ought to be) compromised, those rights of the accused, which relate to fair trial rights are inviolable and not subject to qualification or compromise.

SUBMISSIONS

6. It is submitted that the Transaction Test is the technical and legal recognition of the practical benefits of having accused persons, who are alleged to be closely connected, not simply by their alleged commission of temporally and/or geographically similar crimes but by the concurrence of their shared aims and intentions, jointly tried. This assertion has been given legal expression in the three pronged test in which it is stated that the acts (to justify joinder) should satisfy the following criteria:

(i) Be connected to material elements of a criminal act. For example the acts of the accused may be non – criminal/legal acts in furtherance of future criminal acts;

(ii) The criminal acts which the acts of the accused are to be connected to must be capable of specific determination in time and space, and;

(iii) The criminal acts which the acts of the accused are connected to must illustrate the existence of a common scheme, strategy or plan

Ntabakuze and Kabiligi, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

7. The practical benefits, which accrue when the conditions are met, have themselves been succinctly expressed as "a better administration of justice by ensuring at the same time a more consistent and detailed perception of the

evidence presented by the Prosecutor, better protection of the victims' and witnesses physical and mental safety, and by eliminating the need for them to make several journeys and to repeat their testimony" and to "obviate risks of contradiction in the decision rendered when related and indivisible facts are examined". (Kayishema, Tr.Ch, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996)(see International Criminal Practice 3rd Edition, Jones and Powles para 8.2.42).

8. It is, of course, accepted that a determination of the Transaction test requires an assessment of the factual allegations contained in the indictments and its supporting materials (rather than the evidence itself) (see The Prosecutor v Ntabakuze et al, ICTR – 97 – 34 –I). It is therefore of the utmost importance that the Prosecution demonstrate, by detailed and precise allegations that the stated practical benefits will, by virtue of their fulfilment of the conditions of the Transaction Test, be the natural consequence of joinder.

9. The allegations, upon which they rely to justify joinder, must therefore rise above generalities and broad brush expedient assertions to properly enable the Trial Chamber to adjudicate upon the specific ingredients which comprise the Transaction Test.

10. It is respectfully submitted that the Prosecution satisfy the requirements of certainty and precision only as regards the first two limbs of the Transaction Test. It is submitted that, whilst the acts of the accused enumerated within the indictment, provide some indication of the acts alleged to be either criminal acts or connected to the criminal acts and the relative (although not wholly) temporal and geographical concurrence of those criminal acts, the Prosecution fail, beyond generalities, to describe the "common scheme, strategy or plan" which the criminal acts of the various accused are connected.

11. It is firstly submitted that the Prosecution attempt to allege that there was a common plan shared by the AFRC and the RUF to "take any actions necessary to gain and exercise political power and control over the Territory of Sierra Leone, in particular the diamond mining areas" (paragraph 23 of the

indictment) which "include gaining and exercising control over the population of Sierra Leone in order to prevent or minimise resistance to their geographical control, and to use members of the population to provide support to the members of the joint criminal enterprise" (paragraph 24 of the indictment) is a device created by the Prosecution to attempt to justify joinder.

12. The device thus illustrates little more than the Prosecution desire to ensure that members of the distinct group known as the RUF are tried jointly with those who comprised the AFRC, thus enabling them to lead evidence (which ought only to be lead against only one group) against both. Its imprecise formulation provides little assistance (even when read in the light of the remainder of the indictment) by way of clarification neither of the alleged common scheme, strategy or plan nor of the mechanics of the alleged joint enterprise.

13. It is instead a broad brush attempt to link two very distinct groups (with disparate aims and intentions) simply on the basis that it is alleged that they were committing similar (or the same type of crimes) within the Territory of Sierra Leone. The prosecution have thus strained to obtain an interpretation of the underlying acts to be able to allege the existence of a common scheme, strategy or plan in order to achieve joinder. It is submitted that the inference of a common scheme, strategy or plan can not, reasonably, be drawn for the reasons given below.

"Alliance"

14. The prosecution submit *inter alia* that the Revolutionary United Front (RUF) and/or the Armed Forces Revolutionary Council (AFRC) forged an alliance throughout the relevant period and that the accused participated in a common criminal plan. (see paragraph 20 of the Joinder Motion). This type of assertion (whilst being obviously inaccurate given the AFRC, according to paragraph 7 & 8 of the indictment, did not have any part to play until 25 May 1997) should be closely scrutinised. It is intended to supplement the limited descriptions provided on the indictment which never describes the alleged alliance with any greater particularity than "The AFRC and RUF acted jointly" (paragraph 8 of the indictment).

15. It is submitted that, in the circumstances of this case (and the indictments herein under consideration) the Prosecution should not simply be able to rely upon such a limited description to suggest that the two groups worked together, their interests were the same and that they, through simply the alleged concurrence of their alleged crimes, must have shared a common purpose. On the face of the indictment and in particular paragraphs 2 – 11 the two groups are alleged to be wholly distinct groups, with different beginnings (para 4 & 7) leaders and membership (para 4 & 7); with differing conflicts and negotiations with the Government of Sierra Leone (para 4, 6, 7, 10 & 11). There arises thus a strong inference that the two groups were different and were working separately, with little or no "alliance" which can not be rebutted simply by the bald assertion that they "acted jointly".

Distinct Schemes, Strategies and Plans.

16. It is submitted that the existence of two groups within the territory of Sierra Leone, committing similar (or the same type of) crimes, does not, without greater particularity of the nature of the alliance and their relationship, notwithstanding the partial concurrence (temporally and geographically) of the crimes alleged, allow the inference to be drawn that they shared a plan "to take any actions necessary to exercise political power and control over the Territory of Sierra Leone".

17. In the first place such a description is too vague to be of any real use in determining whether the third limb of the "Transaction Test" is satisfied.

18. The vague and nebulous nature of the plan identified by the Prosecution risks reducing the three limb test to a two limb test. In other words unless the scheme, strategy or plan identified by a Prosecution in a given case, rises above this type of generalisation, the third test (that of the criminal acts illustrating the existence of the common scheme, strategy or plan) becomes otiose. The Prosecution would need, in these circumstances, to do no more than point to any perceived or actual similarity of criminal acts and from that allege therein lies proof of a common plan.

19. Whilst it is accepted that the underlying criminal acts provide the basis from which a plan may be inferred, the plan identified must be sufficiently detailed and nuanced to enable a judgment to be made concerning whether it is merely a prosecutorial device to avoid having to properly satisfy the Transaction test. It is respectfully submitted that the more the indictment suggests that the accused were operating within distinct groups (as in the instant case) the greater the burden on the Prosecution to provide a precise and detailed enumeration of the alleged common scheme, strategy or plan so as to avoid the Transaction Test being reduced to merely a test on the similarity of the criminal acts.

20. Further it is respectfully submitted that the Prosecution reliance on the Nyiramahasuhuko case (see paragraph 21 of the Joinder Motion) only serves to highlight the need for careful scrutiny in this instance. In that case the Prosecution could rely upon the factual allegation that the 6 accused persons were "commonly alleged to be officials in the government, who were alleged to have participated in crimes during the same period of time and who were alleged to have conspired with each other and participated in a national plan to exterminate the civilian population". It is respectfully submitted that such factual allegations define with certainty the precise roles of the accused, the concurrence of their alleged crimes and the exact nature of the criminal enterprise. It allowed thus a rigorous consideration of whether the totality of the criterion laid down in the Transaction Test had been satisfied.

21. In short it is submitted that the Prosecution's attempt to describe a scheme, strategy or plan common to both the AFRC and the RUF, is too vague to satisfy the Transaction test. In the light of the very many factual allegations (contained largely in paragraphs 2 – 11) which demonstrate the existence of two very distinct groups the presumption must be that the groups did not share a common scheme, strategy or plan. In the absence of a clear, precise and detailed description of the shared common scheme, strategy or plan (which the Trial Chamber is thereby able to rigorously scrutinise) that presumption is not displaced.

22. In these circumstances it is submitted the Transaction Test has not been satisfied. It is therefore the submission of the defence that the accused who are alleged to be members of the AFRC should be tried separately from those alleged to be members of the RUF.

WITNESSES

23. The defence submit that, whilst there is some merit in the Prosecution submissions concerning the undesirability of witnesses giving evidence on several occasions (see paragraph 27 of the Joinder Motion) the defence seek to resist the Prosecution motion only to the extent of ensuring that those accused who were members of the RUF are tried separately from those accused alleged to be members of the AFRC. In these circumstances it is submitted the witnesses would be required to give evidence only twice and indeed some witnesses will only have to be present on only one occasion if the two groups are tried separately because if the two groups are distinct some witnesses will only testify regarding the group in question. It is submitted that witnesses might, in fact, be more traumatised by being subjected to cross examination by six counsel – for each of the accused- all at one time, than they would be in two trials separated in time (see The Kayishema Decision 27th March 1997) (see International Criminal Practice 3rd Edition, Jones and Powles para 8.2.53).

FUNDAMENTAL RIGHTS

24. It is difficult to address the issue of whether the accused fair trial rights pursuant to Article 17(4) (c) will be breached in the event of joinder. In the first place the Prosecution (nor the Court) have provided a clear indication of when they envisage the trials (joined or otherwise) commencing. In addition the defence are not fully cognisant of the trial readiness (or perceived readiness) of the defences of the accused the Prosecution seek to join. The defence reserve the right to make further submissions when this information has been either provided or obtained.

CONCLUSION

25. For all the reasons discussed above the Trial Chamber should resist the Prosecution motion and order instead that the accused alleged to be members of the AFRC and those alleged to be members of the RUF be tried separately.

Done in London and Freetown on this 17th November 2003.

William Hartzog, Lead Counsel
Wayne Jordash, Co- Counsel
Abdul Serry Kamal, Co-Counsel

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From:"Ibrahim S Yillah" <yillah@un.org>
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To:whartzog@waxmandorval.com
CC:w.jordash@doughtystreet.com
Subject:Emailing: dcsr970321

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER 2

OR: ENG

Before:
Judge William H. Sekule, Presiding Judge
Judge Yakov Ostrovsky
Judge Lennart Aspegren

Registry:
Mr. Jean-Pelé Fomété

Decision of: 21 March 1997

THE PROSECUTOR
VERSUS
OBED RUZINDANA

Case No. ICTR-95-1-T
Case No. ICTR-96-10-T

DECISION ON PRELIMINARY MOTIONS FILED BY THE DEFENCE

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda-Sue Thornton
Mr. Charles Tate

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The Counsel for the Accused:
Mr. Pascal Besnier

THE TRIBUNAL,

SITTING AS Trial Chamber 2 of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge William H. Sekule as Presiding Judge, Judge Yakov Ostrovsky and Judge Lennart Aspegren;

CONSIDERING the first indictment of 22 November 1995 submitted by the Prosecutor against Obed Ruzindana and confirmed on 28 November 1995 by Judge Navanethem Pillay, subsequently amended on 6 May 1996 by authorisation of that same Judge (Case No. ICTR-95-1-T), and the second indictment of 17 June 1996 submitted by the Prosecutor and confirmed on 21 June 1996 by Judge Tafazzal H. Khan (Case No. ICTR-96-10-T);

CONSIDERING the warrants of arrest and orders for surrender signed by Judge Pillay on 28 November 1995 in the first indictment, and by Judge Khan on 21 June 1996 in the second indictment;

CONSIDERING that the accused was arrested in Nairobi by the Kenyan Authorities on 20 September 1996 on the basis of the warrant of arrest issued on 28 November 1995 by the confirming Judge in Case No. ICTR-95-1-T;

CONSIDERING the initial appearance of the accused on 29 October 1996;

CONSIDERING the preliminary motions submitted by the Defence and received by the Tribunal on Monday 30 December 1996 raising a number of objections against the form of the indictment and against the Prosecutor?s joinder of the accused in Case No. ICTR-95-1-T and also in Case No. ICTR-96-10-T, and seeking on this basis an annulment of the two indictments against Obed Ruzindana and, consequently, the release of the accused;

CONSIDERING the Prosecutor?s response of 17 February 1997 to the preliminary motions filed by the Defence;

CONSIDERING the Defence Counsel?s rejoinder transmitted on 8 March 1997 to the Prosecution?s response mentioned above;

CONSIDERING the oral submissions of the parties during the hearing on 14 March 1997 of the Defence Counsel?s preliminary motions;

CONSIDERING Rules 72 and 73 of the Tribunal?s Rules of Procedure and Evidence ("the Rules"); and

MINDFUL of the Rights of the Accused as provided for in the International Covenant on Civil and Political Rights and other international human rights instruments;

AFTER HAVING DELIBERATED:

WHEREAS the Defence Counsel?s preliminary motions were received by the Tribunal on Satur-day 30 December 1996, two days after the expiration on 28

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December 1996 of the 60 day time-limit from the initial appearance pursuant to Rule 73(B) of the Rules;

WHEREAS the Tribunal is of the opinion that, given the relatively short transgression by the Defence of the time-limit and the fact that the Defence Counsel has still not received all relevant supporting material from the Prosecutor, there would have been a good cause to permit the Defence Counsel to file and to have heard his preliminary motions, if he had so required;

WHEREAS, for these reasons, the Tribunal has chosen to except, in this particular case, the Defence Counsel?s delay in submission of his preliminary motions and is, consequently, ready to hear this motion on its merits as if it were duly submitted;

A. On the Matter of Defects in the Form of the Indictment

WHEREAS, first, the Defence Counsel, in his written and oral submissions, claimed that the French version of the amended indictment of 29 April 1996 in Case No. ICTR-95-1-T, which was the only version of the indictment actually transmitted to the Defence, was neither signed nor dated, for which reason the Defence Counsel contends that this indictment is patently defective and in breach of Rule 47 of the Rules;

WHEREAS, secondly, the Defence Counsel has pointed out that, since the warrant of arrest which formed the legal basis for the arrest of his client was dated 28 November 1995, five months before the amended indictment of 29 April 1996, the arrest of Obed Ruzindana was legally unfounded, as the amended indictment of 29 April 1996 could not be applied retrospectively;

WHEREAS, finally, the Defence Counsel maintains that the warrant of arrest following the confirmation of the first indictment in Case No. ICTR-95-1-T was not accompanied by a statement on the rights of the accused and therefore is in breach of Rule 55 of the Rules;

On the Defence Counsel?s first contention:

WHEREAS the Tribunal finds that the Deputy Prosecutor?s omission of his signature and the correct date on the French version of the amended indictment transmitted to the Defence Counsel in Case No. ICTR-95-1-T appears to be a regrettable omission;

WHEREAS, however, the Tribunal, in considering the English version of the amended indictment, which was duly signed by the Prosecutor on 29 April 1996, and the disputed French version of that same document, is of the opinion that this omission does not amount to defects warranting invalidation of either version, as the operative elements in the English and the French versions were identical and remained unaffected;

On the Defence Counsel?s second contention:

WHEREAS, furthermore, the Tribunal is of the opinion that the Order of 6 May 1996 by the confirming Judge, amending Count 1 of the first indictment so as to expand the relevant time-frame for planning of the crime included in that count, and otherwise lifting the Order of 28 November 1995 for non-disclosure to the public and the media of the names of all accused, was a diligent and practical way of granting

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leave to the Prosecutor to amend the indictment in accordance with Rule 50 of the Rules;

WHEREAS the first indictment of 22 November 1995 was only amended but not repealed by the Order of 6 May 1996 by the confirming Judge, for which reason the warrant of arrest of 28 November 1995 would hence refer to the first indictment as subsequently amended by the said order;

On the Defence Counsel?s last contention:

WHEREAS the first indictment of 22 November 1995, the warrant of arrest of 28 November 1995 and the order for surrender pertaining thereto, as well as a statement of the Rights of the Accused issued by the Tribunal, were duly served by the Registrar on the Kenyan Government on 12 December 1995, while the amended first indictment of 29 April 1996 was duly served by the Registrar on the Kenyan Government on 14 May 1996 in accordance with Rule 55(A) and 55(B);

WHEREAS the subsequent enforcement of warrants of arrest duly served on national authorities by the Registrar in accordance with the Rules, as well as the physical arrest of persons indicted by the Tribunal, are primarily matters falling within the realm of these authorities.

For these reasons,

the Tribunal finds no legal or procedural reasons to object to the form of the indictment or to the order issued by the confirming Judge to grant leave to the Prosecutor to amend the indictment and, consequently, cannot grant relief to the Defence Counsel?s request for annulment of the two indictments brought against the accused and for his release;

B. On the Matter of Extending the Time-limit for Submission of Preliminary Motions on Exclusion of Evidence Obtained from the Accused or Having Belonged to Him

WHEREAS the Defence Counsel, in his written and oral submissions, indicated that the accused wishes to reserve his right to file a preliminary motion concerning exclusion of evidence obtained from or having belonged to him, even after the expiration of the 60 day limit, since the accused claims that he has still not received from the Prosecutor all the material which will enable him to decide whether or not to seek exclusion of such evidence;

WHEREAS Rule 73(C) stipulates that failure to submit within the time-limit prescribed in Rule 73(B) shall constitute a waiver of the right to file preliminary motions, but that the Tribunal may nevertheless grant relief from the waiver if the accused shows a good cause considered on the basis of the facts and circumstances of each single case;

WHEREAS, anyway, the Tribunal finds that failure of the Prosecutor to hand over the supporting material in due time to the Defence cannot and indeed should not exhaust the right of the Defence to file a preliminary motion;

WHEREAS, consequently, the parties may file at any time such motions as may be necessary for the purposes of an investigation or for the preparation or conduct of

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the trial pursuant to Rule 54 of the Rules;

C. On the Matter of the Joinder of the Accused in both Indictments

WHEREAS the Defence Counsel, in his oral and written submissions, argued that the joinder of accused in each of the indictments would necessarily compel the Prosecutor to simultaneously try all the accused persons together under each indictment since, after a possible conviction of Obed Ruzindana, any exculpatory evidence subsequently brought forward in defence of the other co-accused persons, which was not made available during the proceedings against Obed Ruzindana, might cause injustice and deny him the right to a fair trial;

WHEREAS, however, the Tribunal recalls that the Defence retains the right at all times to have the Tribunal?s judgement against his client reviewed if new exculpatory facts or evidence have been discovered, which were not known at the time of proceedings before the Tribunal;

WHEREAS, in the Tribunal?s opinion, the practical consequence of the Defence Counsel?s contention would appear to be that all accused could only be indicted and tried individually, which is clearly against the intention of Rule 48 of the Rules;

WHEREAS, for these reasons, the Tribunal cannot sustain the Defence Counsel?s objection that, unless they can all be tried simultaneously, joinder of the accused in one indictment, and between the accused in two indictments, is in violation of Rule 48 of the Rules;

FOR THESE REASONS,

THE TRIBUNAL

DECIDES to hear the Defence Counsel?s preliminary motions, filed on 30 December 1996, on their merits;

REJECTS the formal objections made by the Defence against the two indictments brought against the accused; and

HOLDS that, pursuant to Rule 48 of the Rules, the joinder of accused does not in itself presuppose that all accused must be tried together at the same time, and that, in any case, Article 25 of the Statute and Rule 120 of the Rules do provide for review of judgements where a new fact has been discovered which was not known at the time of proceedings before a Chamber.

Arusha, 21 March 1997

William H. Sekule	Yakov Ostrovsky	Lennart Aspegren
Presiding Judge	Judge	Judge

Seal of the Tribunal