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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Case No: 2003-05-PT

Registrar: Mr. Robin Vincent

Date filed: 21 November 2003

THE PROSECUTOR

Against

ISSA HASSAN SESAY aka ISSA SESAY

PROSECUTION REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR JOINDER

Office of the Prosecutor:
Mr. Luc Côté
Mr. Robert Petit
Ms. Boi-Tia Stevens

Defence Counsel:
Mr. Wayne Jordash
Mr. Sylvain Roy
Ms. Claire Carlton-Hanciles
Ms. Hadijatou Kah-Jallow
Mr. Ibrahim Yillah

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I. INTRODUCTION

1. The Prosecution files this reply to Defence Response to Prosecution Motion for Joinder (the Response) filed on 18 November 2003, on behalf of Accused Issa Hassan Sesay (the Accused). In the Response, the Defence argues that the Prosecution's allegation of a joint criminal enterprise or common plan between the AFRC and RUF is too broad to meet the same transaction requirement for joinder. The Defence argues that members of the AFRC and member of the RUF should be separately tried.

2. The Prosecution submits that the Defence Reply should be dismissed in its entirety as it represents a skewed view of the Prosecution's case for joinder as set forth in the Prosecution's motion for joinder (joinder motion) filed on 9 October 2003, and is without any basis in fact or in law.

II. ARGUMENT

A. The Same Transaction Test for Joinder

3. While in form the Defence Reply raises a challenge to the sufficiency of the requirement for joinder, a close scrutiny of the Response shows that in essence, the Defence disputes the allegation in the Indictment that the AFRC and the RUF were engaged in a joint criminal enterprise. This is made crystal clear particularly in paragraphs 11, 13, 14, and 15 of the Response. Such a challenge to the accuracy of a factual allegation in an indictment is however, a matter for trial, as is the kind of specific and elaborate information which the Defence is requesting.[1] A joinder application is not to be treated as a trial.[2]

4. Nonetheless, the Prosecution submits that contrary to the Defence submissions in paragraphs 6-22 of the Response, the joinder motion presents sufficient grounds for determining whether the same transaction test for joinder has been met. While the Defence Response has focused solely on the allegation of the AFRC/RUF alliance in the joinder motion, the Prosecution cited to a number of other factors to show that there was a common scheme: similar offences, similar locations where the offences were committed, similar perpetrators and the nature of the relationship between each accused person and the perpetrators. These factors are sufficiently laid out in the joinder motion in paragraphs 19 and 20 and bear no repetition here. Together with the allegation of a joint criminal enterprise, these

[1] *See* the ICTY case of *Prosecutor v. Krstic*, Decision on Preliminary Motion on the Form of the Amended Indictment, Count 7 – 8, 28 January 2000.
[2] *See Prosecutor v. Bagosora et al.*, Decision on the Prosecutor's Motion for Joinder, ICTR-96-7, 29 June 2000, paras. 119-122, filed in this case in the Prosecution's Motion for Joinder.

factors are sufficient to show the existence of a common scheme or plan for purposes of determining the same transaction requirement for joinder.

5. The Prosecution submits that even the nature of the AFRC/RUF joint criminal enterprise or common plan is adequately described in the joinder motion and in the indictment for purposes of determining whether the same transaction test for joinder is met. The alleged purpose of the joint criminal enterprise, the allegation that the crimes charged in the indictment were in pursuit of the joint criminal enterprise and the role of the accused in the enterprise, as described in paragraphs 18-20 of the joinder motion, and in the Indictment against the accused, provide sufficient information about the joint criminal enterprise, from which a determination can be made as to the existence of a common scheme.

6. Even under the analysis used in the *Ntabukuze* case referred to in the Defence Response, the joinder motion provides sufficient basis from which to determine that the same transaction test for joinder has been met. In finding that the third part of the "same transaction" test for joinder had been met, the Court in *Ntabukuze* considered the alleged position of the accused persons, the relationship between the accused persons, the relationship between the accused persons and the perpetrators of the offences and the action of the accused persons viz the perpetrators of the offences.

7. In the instant case, the joinder motion (paragraph 20) sets forth the positions of the accused persons, and the relationship among them, i.e. senior members of the AFRC and or RUF or the AFRC/RUF. The offences referred to in the joinder motion and contained in the Indictments against all the accused persons allege the relationship between the accused persons and the perpetrators, i.e. that the perpetrators were the subordinates of the accused persons. The crimes contained

in the Indictment which are referred to in the joinder motion also allege that the accused persons failed to prevent or punish the perpetrators of the offences. Thus, contrary to the Defence submission, the joinder motion sets out similar factors which were considered to show a common scheme in the *Ntabukuze* case.

B. Witnesses

8. The Prosecution relies on its arguments contained in the joinder motion, specifically in paragraphs 26-28, that separate trials would be detrimental to the physical and mental being of witnesses and for witness protection.

CONCLUSION

9. For the foregoing reasons, the Prosecution requests that the Defence Reply be dismissed in its entirety.

Done in Freetown on this 21st day of November 2003

For the Prosecution,

Luc Côté
Chief of Prosecution

Robert Petit
Senior Trial Counsel

PROSECUTION AUTHORITY

PROSECUTION AUTHORITY

Prosecutor v. Krstic, Decision on Preliminary Motion on the Form of the Amended Indictment, Count 7 – 8, 28 January 2000.

1731

IN THE TRIAL CHAMBER

Before:
Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

Registrar: Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of: 28 January 2000

THE PROSECUTOR

v.

RADISLAV KRSTIC

DECISION ON DEFENCE PRELIMINARY MOTION ON THE FORM OF THE AMENDED INDICTMENT, COUNT 7-8

The Office of the Prosecutor:

Mr. Mark Harmon

Defence Counsel:

Mr. Nenad Petrusic

Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of the Defence "Preliminary Motion on the Form of the Amended Indictment, Counts 7-8."

General Radislav Krstic has been charged in an eight-count indictment with genocide, crimes against humanity, and violations of the laws or customs of war for his role in the events in and around the Bosnian Muslim enclave of Srebenica in 1995. Specifically, the amended indictment alleges that between 11 July 1995 and 18 July 1995, forces of the Army of the Republika Srpska (VRS) under the command and control of Ratko Mladic and Radislav Krstic either expelled or killed most of the members of the Bosnian Muslim population of the Srebenica enclave.[1] According to the amended indictment, General Krstic was the Chief of Staff/Deputy Commander of the Drina Corps of the VRS from October 1994 through 12 July 1995 and assumed command of the Drina Corps on 13 July 1995.

The instant motion concerns counts 7 and 8 of the amended indictment, which charge General Krstic with deportation, a crime against humanity, or in the alternative, inhumane acts (forcible transfer), a

1732

crime against humanity. These counts were not in the original indictment, but were added in October 1999. The amended indictment was confirmed on 22 November 1999, and the Defendant entered a plea of not guilty to the new counts on 25 November 1999. This motion challenging the form of the amended indictment pursuant to Rule 72(A)(ii) was filed by the Defendant on 24 December 1999. The Prosecution filed its response on 18 January 2000.

I. FACTUAL ALLEGATIONS

General Krstic's first objection relates to the evidence supporting counts 7 and 8. He argues that Order No. 01/4 157-5, which was included in the supporting materials submitted by the Prosecution to the confirming judge but which has not yet been presented to the Trial Chamber, does not support the conclusion that General Krstic was responsible as a commander for the deportation or forced transfer of Bosnian Muslims from Srebenica between 11 July and 13 July 1995. Further, he contends, the Prosecution is obliged to submit evidence of the deportation and has failed to do so.

The Prosecution responds that General Krstic's objections are "nothing more than an attack upon the adequacy of evidence in support of a factual allegation" and that it is "well established in the jurisprudence of this Tribunal that disputes as to issues of fact are for determination at trial and thus should be dismissed, as a matter of law, in motions challenging the form of the indictment." In addition, the Prosecution notes that it intends to prove that General Krstic was in fact responsible as a commander for the actions of his subordinates pursuant to Article 7(3) and for his own individual actions pursuant to Article 7(1) regardless of whether he was formally designated as a "Commander" of the Drina Corps on 13 July or whether he still retained the rank of "Chief of Staff/Deputy Commander." Thus, the Prosecution argues, whether or not Order No. 01/4 157-5 ultimately establishes that General Krstic was the "Commander" of the Drina Corps on 13 July 1995 is not of critical importance to its case.

The Trial Chamber agrees with the Prosecution that General's Krstic's challenges based on the evidence are not valid objections to the "form of the indictment" cognisable under Rule 72(A)(ii). The Trial Chambers have consistently held that a "motion on the form of the indictment is not an appropriate way of challenging the evidence" and that proof of the facts alleged in the indictment is a matter for trial.[2] While the Prosecution must plead the material facts in sufficient detail to inform the defendant of the nature and causes of the charges against him, it need not include in the indictment all the evidence it intends to use to support those charges.[3] The judge who confirmed the indictment was satisfied that the indictment, together with the supporting materials submitted by the Prosecutor, established a *prima facie* case. Whether or not the evidence proves the crime is to be determined at trial, and not by way of a preliminary motion under Rule 72(a)(ii).

II. CUMULATIVE CHARGING

The Defendant's second objection is that the acts underlying counts 7-8 (deportation/forcible transfer) are identical with those underlying count 6 (persecution), and that he should have been charged with one or the other (persecution or deportation/forcible transfer) but not both.

The Tribunal's jurisprudence on cumulative charging is still in a state of development. Up until now, the trial chambers have generally held that any overlap in charges is a matter to be addressed not at the indictment stage but at the end of the trial. For example, in *Prosecutor v. Krnojelac*, the trial chamber

1733

stated

> This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts . . . have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty.[4]

And in *Prosecutor v. Delalic*, the appeals chamber refused the defendant's request for interlocutory appeal on the form of the indictment, holding that the trial chamber did not commit error when it held that cumulative charging was better dealt with at the penalty stage.[5]

While it has been the practice of the trial chambers to leave the question of cumulativeness for the end of trial, there are good reasons for considering the matter of cumulative versus alternative charging at the beginning. If the issues are clarified and narrowed at the outset, it may help in making the proceedings, which have heretofore lasted months and even years, more focused and efficient. In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same "offence" for purposes of conviction and sentencing. As the Trial Chamber in *Kupreskic* recently explained:

> The approach currently adopted by the Prosecution creates an onerous situation for the Defence, on the grounds that the same facts are often cumulatively classified under different headings . . . . In practice, however, the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge.[6]

To reconcile these somewhat conflicting concerns, the *Kupreskic* trial chamber opined that the prosecutor "should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove."[7] In many instances, it may be useful to consider before the trial begins which charges should be considered in the alternative rather than cumulatively because it is clear that one offence charged includes all the elements of another.

In the case before us, the Defendant objects to the overlap between count 6 (persecution) and counts 7 (deportation) and 8 (inhumane acts/forcible transfer). The scope of the overlap is not entirely clear at this stage. As the Prosecution points out, the act of deportation or forced transfer is but one of five types of actions alleged to constitute persecution under Count 6; other alleged persecutory acts include the murder of Bosnian Muslims, cruel treatment such as beatings, terrorising of civilians, and destruction of personal property. Additionally, the crime of persecution requires a discriminatory intent which the crime of deportation does not. Some national courts, faced with similar situations, have held that "whether an aggregate of acts constitute a single course of conduct and therefore a single offence, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts."[8] Indeed, one reason why so many of the Trial Chambers have frequently left decisions on cumulativeness until the end of trial may be that "[u]nlike provisions of national criminal codes . . . each Article of the [Tribunal's] Statute does not confine itself to indicating a single category of well-defined acts" but instead "embrace[s] broad clusters of offences sharing certain *general* legal ingredients."[9] This often makes it difficult to analyse the overlap in charges before the proof is in. As the Tribunal's case law develops and the elements of each offence become more well-

1734

defined, it may become easier to analyse the overlap in particular charges before trial. The charges to which General Krstic objects do not, however, present such a clear-cut example of unduly cumulative charging as would require that they be pleaded alternatively at this time.

Accordingly, the Trial Chamber rejects the Defendant's objection to the indictment on these grounds. The Trial Chamber does note, however, that it may be useful, in terms of conducting an efficient trial, for the parties to address the issue of cumulativeness on all relevant charges in their pre-trial briefs. That possibility will be discussed at upcoming status conferences.

III. DISPOSITION

For the foregoing reasons,

TRIAL CHAMBER I,

PURSUANT to Rule 72,

HEREBY DENIES the Defendant's Preliminary Motion on the Form of the Amended Indictment, Counts 7-8.

Done in French and English, the English text being authoritative.

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Almiro Rodrigues
Presiding Judge

Dated this twenty-eighth day of January 2000
At the Hague,
The Netherlands

(SEAL OF THE TRIBUNAL)

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1. *See* Amended Indictment, para. 11.
2. *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Esad Landzo Based on Defects in the Form of the Indictment, 15 November 1996, para. 9; *see also, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20; *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 20; *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on defects in the Form of the Indictment, 2 October 1996, paras. 7, 11.
3. *See, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20.
4. *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, at para. 5. As examples of this practice, the *Krnojelac* trial chamber cited *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, paras. 15-18; *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, 2 October 1996, para. 24; *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 32; *Prosecutor v. Kupreskic*, Case No. IT-95-16-PT, Decision on Defence Challenges to the Form of the Indictment, 15 May 1998, p.3.
5. *See Prosecutor v. Delalic, et al.*, Case No. IT-96-21-AR72.5, Decision Application for Leave to Appeal by Hazim Delic

1735

(Defects in the Form of the Indictment), 6 December 1996, para. 36.
6. *Prosecutor v. Kupreskic*, Case No. IT-95-16-PT, Judgement, 14 January 2000, paras. 721-723.
7. *Id.*, para. 727.
8. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225 (1952).
9. *Kupreskic*, para. 697.