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SCSL-2003-13-PT
(1291 - 1297)

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2003-13-PT

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: October 30, 2003

THE PROSECUTOR

against

**SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known
as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU
also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as
BORBOR SANTIGIE KANU**

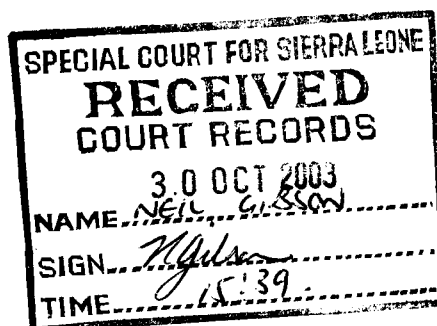
**DEFENSE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION ON DEFECTS IN THE
FORM OF THE INDICTMENT AND FOR PARTICULARIZATION OF THE INDICTMENT**

Office of the Prosecutor:

Mr. Luc Coté
Mr. Robert Petit
Mr. Christopher Santora

Defense Counsel:

Mr. Geert-Jan Alexander Knoops



I INTRODUCTION

- 1. Pursuant to Rule 7(C) of the Rules of Procedure and Evidence (hereafter referred to as the “**Rules**”), the Defense herewith, on behalf of Mr. Kanu (hereafter referred to as the “**Accused**”) submits this Reply to the “Prosecution Response to Defence Motion on Defects in the Form of the Indictment and for Particularization of the Indictment” (hereafter referred to as the “**Prosecution Motion**”), filed on [October 24, 2003], which the Defense only received on October 27, 2003.
- 2. In this Reply, the Defense presents the following arguments to rebut the submissions made by the Prosecution in the Prosecution Motion.

II LACK OF SPECIFICITY REGARDING JOINT CRIMINAL ENTERPRISE

- 3. The Prosecution asserts in paras. 4 and 5 of the Prosecution Motion that the Accused’s role in the alleged joint criminal enterprise is sufficiently specified. However, in this particular case, arguments exist that this alleged role is insufficiently delineated. In this respect the Prosecutor states in para. 6 that the Defense’s interpretation of the *Krnojelac* Decision on the Defence Preliminary Motion on the Form of the Indictment,¹ would be erroneous. The Defense refutes this conclusion. The particular section in the *Krnojelac* Decision only refers to the accused’s complaint that no distinction was made between superior and individual responsibility as to several counts. On this particular point, the ICTY Trial Chamber ruled that the Indictment was consistent with either type of responsibility. In para. 7 of that Judgment, the following can be read: “*A pleading is not defective because its style is clumsy provided that, when taken as a whole, the indictment makes clear to each accused, (a) the nature of the responsibility (...).*”²
- 4. In the case of Mr. Kanu, however, the indictment apparently only intends to link the Accused with certain alleged acts of the AFRC/RUF, without specifying at all as to the precise role of the Accused in these acts. Therefore, the indictment fails to clarify the

¹ See footnote 1 of the Prosecution Motion.
² Emphasis added.

nature of his alleged participation as an individual in the common plan or joint criminal enterprise would be.

5. In para. 5 of the Prosecution Motion, it is indicated that the mere accusation of holding a position of authority within the AFRC and the AFRC/RUF, would automatically mean that by virtue of this position, the accused participated in the alleged common plan. However, the mere fact that he was to have held a position of authority within these entities does not clarify any role within the context of a common plan or joint criminal enterprise.
6. With respect to the argument of the Prosecution in para. 6 of its Response Motion, submitting that it is not required to elect between the basic and the extended form of joint criminal enterprise, the Defense persists in its argument, as set out in para. 7 of the Motion on Defects in the Form of the Indictment and for Particularization of the Indictment dated October 16, 2003 (hereafter referred to as the “**Defense Motion**”), the following reply is appropriate. Indeed, in the *Krnojelac* Decision a factual different situation occurred. However, the reasoning of the *Krnojelac* Trial Chamber should be applied by way of analogy as the underlying principle is also applicable to the issuance of the indictment itself. This basic principle, to be derived from the *Krnojelac* Decision is clearly that it is not allowed to charge someone with the basic form of joint criminal enterprise in the indictment, and consequently hold the Accused responsible based upon the extended form thereof. As a consequence, in order to fulfill the requirement of specificity, the Prosecution should indicate which form of joint criminal enterprise it envisions, to enable the Accused to properly prepare his defense. The Accused may, during the course of his Trial, not be confronted with a different form of one of the three categories of joint criminal enterprise and this argument is therefore supportive for the notion that the initial indictment should provide clarity beforehand.
7. Finally, the remark in para. 7 of the Prosecution Response as to the alleged groundlessness of linking joint criminal enterprise to each of the separate crimes, the

Defense refers to the mentioned *Krnojelac* Decision in para. 487 in conjunction with para's 127,170, 315, 346 and 427.³

III LACK OF SPECIFICITY REGARDING SUPERIOR RESPONSIBILITY

8. Paras. 18 – 26 of the Indictment merely mention the Accused's alleged military position. It fails to specify in any sense to what extent the Accused as an individual exercised effective control over his alleged subordinates. Especially the argument presented in para. 12 of the Defense Motion is left untouched.

IV LACK OF SPECIFICITY REGARDING IDENTITY AND NUMBER OF VICTIMS

9. In his commentary in *Annotated Leading Cases of International Criminal Tribunals*, the author John O'Dowd, while assessing several decisions of the ICTR concerning the form of indictment, argues "*the Tribunals (...) have ruled that lack of specificity in an indictment cannot be cured by (...) pre-trial discovery to the defense of supporting material*".⁴ This analysis is supportive for the arguments put forward by the defense in the underlying motion with respect to the requirement of specificity as to the identity and number of victims. Furthermore, the *Krnojelac* Decision on the Defence Preliminary Motion on the Form of the Indictment states that "[a]n indictment must contain information as to the identity of the victim, the place and approximate date of the alleged offense and the means by which the offense was committed." The Defense holds that the reasoning of the Trial Chamber developed in these paragraphs can be applied to the requirement of the form of the indictment as well. After all, in *Prosecutor v. Kvočka*, the ICTY opined that "*There may be cases in which more specific information can be provided as to the time, the place, the identity of victims ...in those cases, the Prosecution should be required to provide such information.*"⁵

10. Reference is made in particular to the following two ICTR Decisions:

³ According to the Defense the reasoning of the Trial Chamber developed in these paragraphs is also applicable to the requirement as to the form of indictment with respect to joint criminal enterprise.

⁴ See John O'Dowd, in his commentary in, *Annotated Leading Cases of International Criminal Tribunals. The International Criminal Tribunal for Rwanda 1994 – 1999*, (A. Klip & G. Sluiter, eds.) Antwerp: Intersentia 2001 at 75.

⁵ See Decision on Defense Preliminary Motions on the form of the Indictment, ICTY case no. IT-98-30-T, 12 April 1999 para. 17.

(a) In *Prosecutor v. Nsabimana*, the ICTR Trial Chamber stated that “[w]e underscore the need to have the precise statement of facts correspond to and explain the specific charges. The Prosecutor should also ensure that the facts used as a basis for the charges are clear enough so that the accused will not have to refer to the witness statements.”⁶ Moreover, the ICTR Trial Chamber indicates in this same decision that the Prosecutor should provide additional information to indicate the manner in which the accused is linked to the alleged acts that form the basis of the charges.

(b) In *Prosecutor v. Nyiramashuko*, the ICTR observed that “(...) the indictment on its own must be able to present clear and concise charges against the accused, to enable the accused to understand the charges.”⁷

11. Finally, supportive to the Defense arguments on this issue, forms the jurisprudence of the European Court of Human Rights. In *Pélisier & Sassi v. France*, the European Court held that in criminal matters “... the provision of full detailed information concerning the charges against a defendant, and consequently the legal characterization (emphasis added; GJK) that the Court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.”⁸

12. This interpretation by the European Court of Human Rights also affirms the requirement of specificity regarding the exact form of criminal enterprise as mentioned in section II above in this reply.

V LACK OF SPECIFICITY REGARDING COUNT TWO: “COLLECTIVE PUNISHMENTS”

13. The commentary developed in this reply in section II-IV above is also applicable to the Response of the Prosecutor with respect to the Defense arguments pertaining to the issue of “collective punishment.”

⁶ *Prosecutor v. Nsabimana*, ICTR-97-29A-T, Decision on the Defence Motion for the Amendment of the Indictment, Withdrawal of Certain Charges and Protective Measures for Witnesses, September 24, 1998.

⁷ See Decision on the Preliminary Motion by Defense Counsel on Defects in the Form of Indictment, case no. ICTR-97-21-1, 4 September 1998, para. 13.

⁸ See European Court of Human Rights, Judgment 25 March 1999, no. 25444/94, para 52.

VI LACK OF SPECIFICITY REGARDING PHRASES IN THE INDICTMENT

14. Paras. 14 and 15 of the Prosecution Motion, may be refuted by the *Krnojelac* Decision on the Defence Preliminary Motion on the Form of the Indictment, where it was stated that “[w]hat must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.”⁹ The ICTY Trial Chamber in this respect also refers to *Prosecutor v. Nyiramashuko*, the ICTR held that: “[w]hilst it is essential to read the indictment together with the supporting material, the indictment on its own must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance.”¹⁰ Therefore the argument of the Prosecution in para. 15 as to the alleged position of the Accused and the massive scale of the crimes are not in itself decisive factors to dispute this case law.

15. Hence, the Indictment is impermissibly broad in this respect, and should be particularized.

VII CRITERIA DERIVING FROM CASE LAW WITH RESPECT TO FORMS OF INDICTMENT

16. Contrary to para. 17 of the Prosecution Motion, the *Krnojelac* Trial Chamber in its Decision on the Defence Preliminary Motion on the Form of the Indictment states in para. 12 thereof, that “[a]n indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.”¹¹ It further argues that “[the prosecution] cannot be obliged to perform the impossible, but in some cases there will then arise the

⁹ *Prosecutor v. Krnojelac*, ICTY Decision on the Defence Preliminary Motion on the Form of the Indictment, dated February 24, 1999, para. 13.

¹⁰ *Prosecutor v. Nyiramashuko*, ICTR-97-21-I, Decision on Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, September 4, 1998, cited in *Prosecutor v. Krnojelac*, ICTY Decision on the Defence Preliminary Motion on the Form of the Indictment, dated February 24, 1999, para. 14 and footnote 26.

¹¹ *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form thereof, April 4, 1997, para. 20, cited in para. 12 and footnote 19 of *Prosecutor v. Krnojelac*, ICTY Decision on the Defence Preliminary Motion on the Form of the Indictment, dated February 24, 1999.

question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.”¹² This reasoning affirms para. 36 of the Defense Motion, so that the absence of concrete and precise allegations and particulars as to these factual elements clearly affects the validity of the Indictment.

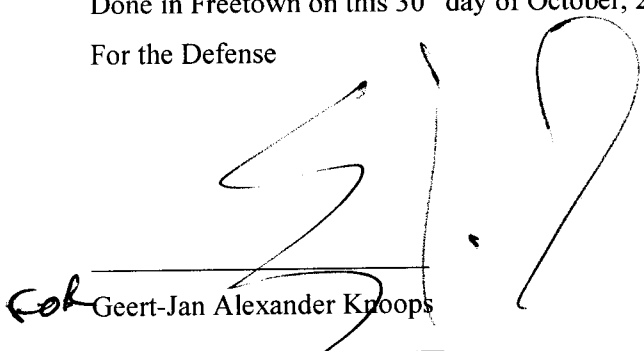
17. The requirement of specificity inevitably relates to the notion of fair trial and a proper preparation of the Defense, under which the ability to effectively prepare cross-examination of witnesses. This approach finds indeed support in international case law.¹³

VIII CONCLUSION

18. For these reasons, the Defense respectfully persists in praying this Special Court primarily to order the Prosecution to specify or particularize the elements of the Indictment, failure of which should result in dismissal of the Indictment.

Done in Freetown on this 30st day of October, 2003,

For the Defense



Geert-Jan Alexander Kroops

Chief Public Defense Office

Sylvain Roy

¹² *Prosecutor v. Krnojelac*, ICTY Decision on the Defence Preliminary Motion on the Form of the Indictment, dated February 24, 1999, para. 40 (footnotes omitted).

¹³ See the previously mentioned case law of the European Court of Human Rights, especially in *Pélissier & Sassi v. France*, para. 52.