

-SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Judge Teresa Doherty, Presiding Judge
Judge Richard Lussick
Judge Julia Sebutinde

Registrar: Mr. Robin Vincent

Date filed: 14 April 2005

THE PROSECUTOR

Against

**Alex Tamba Brima
Brima Bazy Kamara
Santigie Borbor Kanu**

Case No. SCSL – 2004 – 16 – T

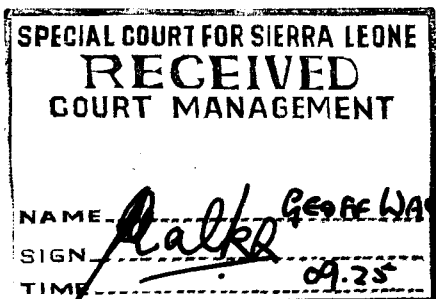
**PROSECUTION RESPONSE TO JOINT DEFENCE REQUEST FOR
DISCLOSURE OF INDEPENDENT INVESTIGATOR’S REPORT ON
CONTEMPT OF COURT PROCEEDINGS AND REQUEST FOR STAY OF
PROCEEDINGS**

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I. PROCEDURAL BACKGROUND

1. On 10 March 2005 the Trial Chamber delivered a decision in which the Trial Chamber ordered the Registrar, pursuant to Rule 77(C)(iii) of the Rules of Procedure and Evidence to appoint an independent counsel to investigate and to prosecute five named persons for contempt of the court, one of whom is the investigator of the Defence team of the Accused Brima (“the contempt investigation”). The Trial Chamber also ordered certain interim measures, including the suspension of the investigator of the Defence team of the Accused Brima.¹
2. After the conclusion of the evidence in chief of witness TF1-023 all Defence Counsel indicated that they were not in a position to cross-examine and would seek leave of the Court to do so at some future time.² Shortly thereafter the proceedings were adjourned to 14 March 2005 for mention only.³

¹ Transcript, 10 March 2005, pp. 15-16.

² Transcript, 10 March 2005, p. 42 (line 20) to p. 43 (line 22).

³ Transcript, 10 March 2005, p. 54 (line 12) to p. 55 (line 11).

3. On 14 March 2005 the Office of the Principal Defender indicated that a replacement investigator was available for the Brima Defence team.⁴ The Court noted that the concerns of Counsel that had led to the adjournment from 10 March 2005 to 14 March 2005 had been accommodated and held that it was fair and expeditious to allow further time for briefing and investigations.⁵ Accordingly, the trial was adjourned to 5 April 2005.
4. On 4 April 2005 the “Joint Defence Request for Disclosure of Independent Investigator’s Report on Contempt of Court Proceeding and Request for Stay of Proceedings” (“the Joint Defence Request”) was filed. The Joint Defence Request argues:
 - a) That the report of the independent investigator should be disclosed to the Defence in compliance with fair trial rights and that the trial of the Accused should be stayed until such disclosure is made.
 - b) That the Defence is unable to cross-examine Prosecution witnesses because of three matters. First, that the Brima Defence team is under a “shadow of suspicion” arising from the suspension of its investigator. Second, that Defence Counsel may be called upon in any contempt proceedings. Third, that as a result of the suspension of the investigator coupled with the fact that the Brima Defence team “does not wish” to assign a new investigator, and that the Kamara Defence Team does not yet have a new investigator, the Defence has no information upon which to base its cross-examination.
 - c) That the Defence is unable to cross-examine witness TF1-023 because the information the Brima Defence team has about this witness may be tainted and the joint defence strategy adopted by all Defence Counsel renders this handicap applicable to all Defence teams.

⁴ Transcript, 14 March 2005, p 2 (lines 10-14).

⁵ Transcript, 14 March 2005, p 5 (line 29) to p. 6 (line 19).

- d) That there is an uncertainty as to the legality of the contempt investigation raised by the “Joint Defence Notice of Appeal”⁶ which hinders the Defence in its trial preparation.
 - e) That the Article 17(4)(b) rights of the Accused prevent the Defence from resuming cross-examination.
5. The Prosecution argues that the Joint Defence Request is without merit and should be dismissed in its entirety.

II. ARGUMENT

6. As a preliminary issue, the Prosecution notes that the Joint Defence Request is styled as a “request” rather than as a “motion”. However, as the Joint Defence Request seeks relief from the Trial Chamber within the terms of Rule 73, the Prosecution files this Response as if the document was filed as a motion.

Lack of Standing

7. The contempt investigation is a matter separate to and distinct from the trial proceedings against *Brima* and others. The Defence Counsel assigned to represent the three Accused in this case have not been assigned to represent the five suspected contemnors.⁷
8. Rule 77(C)(iii) is unambiguous in its terms that the report of the independent investigator is to go to the Chamber. The Prosecution and the Defence do not have any right to receive the report of the investigation. Neither has the Joint Defence Request articulated any cogent reason why, as a matter of discretion in ensuring a fair trial, the Chamber should disclose the report of the independent investigator to the Defence. Each of the separate arguments is answered below.

“Shadow of Suspicion”

9. The conduct of the investigator assigned to the Brima Defence Team has been investigated. No judicial finding has yet been made about such conduct. The Prosecution submits that in the circumstances it is erroneous to suggest that an

⁶ Filed 11 March 2005.

⁷ No power of attorney has been filed pursuant to Rule 44(A).

investigation centred on a logistical member of a Defence Team could possibly reflect upon Defence Counsel or the Accused. A Defence team, comprised of Counsel, investigators, interpreters, drivers and other support personnel is not an organism that is indivisible. The ethical obligations imposed upon Counsel before the Court will always distinguish them from others with whom they interact in trial preparation.

10. The Prosecution notes that any possibility of a query as to ethical standing of Defence Counsel for the Accused Brima before the Court was extinguished by the comments of Judge Sebutinde on 10 March 2005.⁸

Defence Counsel May Appear in Contempt Proceedings

11. If any contempt proceedings arise out of the contempt investigation, the only capacity in which Defence Counsel might appear in those proceedings is as a witness. As such, no adverse inference relating to the substance of the contempt allegations could ever be drawn against Defence Counsel, irrespective of the outcome of any such proceedings.
12. The Prosecution notes that Trial Chamber II has already indicated that the possibility that Defence Counsel may appear as witnesses in any contempt proceedings means that any such proceedings will not take place before the Judges of Trial Chamber II.⁹ Any assessment of Defence Counsel in their capacity as witnesses will thereby be quarantined from their role as Counsel in the instant proceedings.

Lack of Information from an Investigators

13. As noted in paragraph 3 above, a replacement investigator has been available to the Brima Defence Team since at least 14 March 2005. On 5 April 2005, the Office of the Principal Defender stated that since that time numerous replacement investigators had been offered to the Accused Brima and his Counsel.¹⁰ The Joint Defence Request makes plain that the Brima Defence Team has chosen not to

⁸ Transcript, 10 March 2005, p. 47 (lines 2-18).

⁹ Transcript, 10 March 2005, p. 15 (lines 19-22).

¹⁰ Transcript 5 April 2005, p. 6 (line 27) to p. 7 (line 9).

assign a replacement investigator.¹¹ This was the position on 14 March 2005.¹² This position was reiterated on 5 April 2005.¹³ This choice has been made because the Accused Brima does not want a new investigator assigned.

14. The Prosecution submits that an Accused person does not have a right to the choice of an investigator.¹⁴ The decision of the Brima Defence Team not to accept a new investigator as offered by the Office of the Principal Defender is a forensic decision freely available to it, but one for which the team must accept the consequences. Accordingly, no issue as to equality of arms arises. As was said in *Prosecutor v Kayishema and Ruzindana*, once a Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence have been made available to Defence Counsel, “[t]he utilization of those resources is not a matter for the Trial Chamber”.¹⁵
15. On 10 March 2005 it was argued by Defence Counsel for the Accused Brima that the lack of an investigator was prejudicial because witnesses gave new information in the witness box.¹⁶ There has been a remedy available for that prejudice, if it occasionally arises, since at least 14 March 2005.
16. Further, the Prosecution notes that the suspended investigator had been working for the Brima Defence Team since January 2005.¹⁷ Given that the this investigator worked for approximately 2 months prior to his suspension, it follows that the Brima Defence Team must be in possession of information gained by the suspended investigator’s predecessor(s) as well as from him. In this context, it is to be remembered that the Defence have been in possession of the redacted statements of the Prosecution witnesses since 2003.

¹¹ Para. 6 of the Joint Defence Request states that “[t]he Brima Defence team does not wish to assign a new investigator ...”.

¹² Transcript, 14 March 2005, p. 4 (line 27) to p. 5. (line19).

¹³ Transcript, 5 April 2005, p. 7 (line 14) to p. 8 (line 8).

¹⁴ *Prosecutor v Pauline Nyiramasuhuko*, ICTR-97-21, “The President’s Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar’s Decision Pertaining to the Assignment of an Investigator”, 13 November 2002, para. 7.

¹⁵ *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1, “Judgement”, 21 May 1999, para. 61.

¹⁶ Transcript, 10 March 2005, p. 46 (lines 20-22).

¹⁷ Transcript, 10 March 2005, p. 44 (lines 26-28).

17. On 10 March 2005, Defence Counsel for Kamara stated that there was no investigator on his team.¹⁸ This issue was raised as the first of two reasons why Counsel could not cross-examine witness TF1-023, after Counsel for the Accused Brima and the Accused Kanu both indicated that they were not in a position to cross-examine the witness. Counsel for Kamara had previously cross-examined witnesses TF1-024 and TF1-277 without indicating any difficulty due to a lack of investigator. On 14 March 2005 the Office of the Principal Defender indicated that the recruitment of a new investigator for the Kamara Defence Team was almost completed.¹⁹
18. The Joint Defence Request filed 4 April 2005 stated that the Kamara Defence Team did not have a new investigator, although one who had yet to resign his current employment was in the process of being assigned. On 5 April 2005, the Office of the Principal Defender said that the new investigator “came on board a few days ago”²⁰ and Counsel for the Accused Kamara stated that the investigator for the Kamara Defence Team “came on board fully yesterday”.²¹ The Prosecution notes the inconsistency of the information submitted to the Court.
19. The Prosecution submits that the Defence has, on numerous occasions, made their joint defence strategy plain.²² Counsel for the Accused Kanu has stated that information gained from one investigator is to a certain extent shared between all Defence Counsel.²³
20. Defence Counsel chose not to cross-examine witnesses TF1-023 and TF1-098. Since then, Defence Counsel have cross-examined witnesses TF1-278, TF1-084, TF1-085, TF1-320, TF1-083 and TF1-227. Counsel for the Accused Brima indicated prior to her cross-examination of witness TF1-278 that she was doing so “within the limitations of the constraints” she had.²⁴ Since then, Defence Counsel

¹⁸ Transcript, 10 March 2005, p. 43 (lines 4-5).

¹⁹ Transcript, 14 March 2005, p. 2 (lines 15-16).

²⁰ Transcript, 5 April 2005, p. 7 (lines 10-11).

²¹ Transcript, 5 April 2005, p. 15 (lines 23-24).

²² See para. 7 of the Joint Defence Request.

²³ Transcript, 14 March 2005, p. 2 (lines 21-29).

²⁴ Transcript, 6 April 2005, p. 13 (lines 10-11).

have not raised any issue as to their stated inability to cross-examine Prosecution witnesses.²⁵

21. The Prosecution submits that in light of the above, the Defence submission that it is inadequately prepared for the cross-examination of Prosecution witnesses²⁶ and unable to cross-examine Prosecution witnesses²⁷ cannot be maintained.

Witness TF1-023

22. This witness was released by the Court following the conclusion of her evidence in chief and, as noted in paragraph 2 above, all Defence Counsel indicated that they may seek leave to have the witness recalled in the future. The Prosecution will respond to any such application at the time it is made.
23. Any suggestion that the veracity of the information gained by the suspended investigator about this witness might be tainted by a proven particular breach of protective measures afforded to the witness is speculative, at best.

The Pending Defence Appeal

24. The Prosecution submits that the filing of the Joint Defence Notice of Appeal is irrelevant to the continuation of the trial proceedings. The contempt investigation and any proceedings that may arise therefrom are separate to and distinct from the trial proceedings. Further, any immediate logistical difficulty caused to the Brima Defence Team by the suspension of their then investigator on 10 March 2003 has been curable since at least 14 March 2003. The refusal of the Brima Defence Team to take advantage of a new investigator as offered by the Office of the Principal Defender is a forensic choice, and not a matter for the Trial Chamber.

Article 17(4)(b)

25. Article 17(4)(b) enshrines the right of an Accused to have adequate time and facilities for the preparation of his or her defence and to communicate with

²⁵ On 11 April 2005 Counsel for the Accused Brima did note the lack of an investigator as a reason for exploring how witness TF1-227 came to give a statement to the Special Court. See Transcript, 11 April 2005, p. 99 (line 28) to p. 100 (line 7).

²⁶ Para. 6 of the Joint Defence Request.

²⁷ Para. 5 of the Joint Defence Request.

counsel of his or her own choosing. As noted in paragraph 14 above, an Accused does not have a right to an investigator of his or her own choosing. Further, the history of the adjournments granted and resources offered rehearsed above, establish that there has been no violation of the Article 17 rights of the Accused.

Conclusion

26. For the foregoing reasons, the Prosecution submits that the Defence have no right to a copy of the report of the independent investigator. Nor has the Defence demonstrated cogent reasons why a copy of the report should be disclosed to them as an exercise of the Chamber's discretion. Further, there are no grounds upon which a stay of proceedings can be properly grounded. The Prosecution respectfully submits that the Joint Defence Request should be dismissed in its entirety.

Dated this 14th day of April 2005.

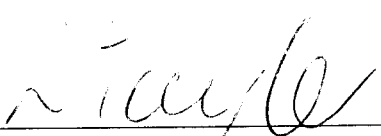
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PROSECUTION INDEX OF AUTHORITIES

Prosecutor v Kayishema and Ruzindana, ICTR-95-1, “Judgement”, 21 May 1999.
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Prosecutor v Pauline Nyiramasuhuko, ICTR-97-21, “The President's Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator”, 13 November 2002.
<http://www.ictor.org/default.htm>