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SCSL-2003-05-PT  
(1675-1679)

1675

THE SPECIAL COURT FOR SIERRA LEONE

**BEFORE:**

**Judge Benjamin Itoe**  
**Judge Bankole Thompson**  
**Judge Pierre Boutet**

**Registrar: Mr Robin Vincent**

**Date filed:**

**The Prosecutor**

-v-

**Issa Hassan Sesay**

**Case No: SCSL - 2003 - 05 - PT**

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**DEFENCE REPLY TO PROSECUTION RESPONSE TO  
DEFENCE MOTION TO REQUEST  
THAT THE TIME PERIOD FOR RESPONSE TO THE PROSECUTION  
MOTION FOR JOINDER  
COMMENCE UPON THE RECEIPT OF THE  
MODIFIED OR PARTICULARISED INDICTMENT(S) OR ON A DATE TO  
BE SET BY THE TRIAL CHAMBER**

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Defence Counsel  
William Hartzog, Lead Counsel  
Wayne Jordash, Co- Counsel  
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SPECIAL COURT FOR SIERRA LEONE	
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## INTRODUCTION

1. The Defence bring this motion in response to the Prosecution Response (the “Response”) to the Defence Motion (the “**Defence Motion**”) to request that the time period for response to the Prosecution Motion for Joinder (the “**Joinder application**”) commence upon receipt of the modified or particularised indictment(s), ordered by Honourable Bankole Thompson, the Trial Chamber Judge designated under Rule 28 of the RP to rule on the Motion concerning “Defects in the indictment” in his decision and order rendered on October 9, 2003 (**the Order**) or on a date to be set by the Trial Chamber.
2. In the “Response” the Prosecution seek to argue;
  - (i) That “an amended Indictment or Bill of Particulars is not necessary for the determination of the Prosecution Motion for Joinder”.
  - (ii) That “hypothetical Motions on Form of the Indictment (are) not relevant to (the) response to Prosecution Motion for Joinder” and,
  - (iii) That “irrespective of the Order to delete or furnish details as to “but not limited to those events”, the Prosecution maintains that as currently framed, the Sesay Indictment sufficiently establishes the requirement of the existence of the “same or different crimes committed in the course of the same transaction” (referring to Rule 48(B) of the Rules of Procedure and Evidence).

## THE PROSECUTOR’S ARGUMENT

### *That an amended Indictment or Bill of Particulars is not necessary to the determination of the Prosecution Motion for Joinder*

3. The defence observe the Prosecution attempt to re-categorise the “Defence Motion” as a “fourth request for an extension of time thus far filed by Defence Counsel for the Accused”. (para.3 of the “Response”). The defence would nevertheless, invite the Trial Chamber to adjudicate upon the merits of the application which, it is submitted, are focussed, in essence upon whether the Prosecution ought to be permitted to require that both the defence and the Trial Chamber consider the “Joinder” application prior to their amendment of the defective indictment.
4. The defence fail to appreciate the relevance of the existence and number of prior applications (similar or otherwise) to the merits of the present Motion. The attempt by the Prosecution to introduce the “exceptional circumstances or good cause” test by its purported re – categorisation of

the defence Motion serves only to allow the Prosecution to retain the advantage they presently possess (as regards both the defence and the Trial Chamber) in being able to ascertain “the precise allegations against the Accused” (see paragraph 33 of the Order).

5. In the event that the Prosecution’s analysis is correct, the defence respectfully submit that the Trial Chamber’s Order finding that the Accused’s indictment *inter alia* is “objectionable in not specifying the precise allegations against the Accused”, the consequential order to amend ought, nevertheless in the interests of justice, be considered to fall well within the meaning of “good cause”.
6. The Prosecution’s approach is contradictory and thus prays the Trial Chamber to conclude that “the Joinder” application should be acceded to *inter alia* because of
  - (i) the fact that the indictments are essentially identical against each accused” and,
  - (ii) that the Order does not affect the bulk of the facts alleged to be the basis for the common transaction (para 5 of The Response) whilst seeking to deny either the defence or the Trial Chamber the opportunity to enable those propositions to be either challenged or adjudicated upon.
7. Furthermore paragraphs 23 – 29 of The Response may well in the final analysis highlight practical considerations “as to how a joint trial serves the interest of justice given that the case brought against each accused is based upon the same body of evidence”. It may also be that those considerations are “independent of any finding by the Trial Chamber as to whether such charges and crimes may be found in need of elaboration by the Prosecution” (see paragraph 6 of “the Response”). The fact that in the instant motion there are a number of considerations to be finely analysed and balanced only serves to highlight the necessity that all considerations (practical or technical, independent or inter -dependant) be adjudicated upon at the same time by the Trial Chamber and only when all parties are in possession of all the information which determines the interests of justice.
8. It is submitted that the alternative, would seem to again be “tantamount to pleading by ambush” (see “the Order” paragraph 33). The Prosecution approach could, by relying upon the mechanism of a Bill of Particulars, place themselves in a position where, were they to fail in their attempt to join the present defective indictments, they could nevertheless, force the issue to be re-adjudicated. The defence respectfully urge the Trial Chamber to resist this incremental approach as both unfair and unsatisfactory.

***The Prosecution's Argument that there could thus be eventual Hypothetical Motions on Form of the Indictment Not Relevant to the Response to Prosecution Motion for Joinder.***

9. The Prosecution assert that the Defence application relies upon "hypothetical Motions" (paragraph 8 of the Response). It is submitted that this misrepresents the obvious and logical application of "the Order" to all the proposed co – accuseds' indictments. On the contrary, it is the Prosecution's prayer to have the Trial Chamber accept, in the absence of amended indictments, that they "would have no impact upon the basis and validity of the Prosecution Motion for Joinder" (see paragraph 8 of the Response) which introduces into the decision making process elements of the hypothetical with the attendant and consequential risks of uncertainty and injustice.

***The Prosecution Arugment that "irrespective of the Order to delete or furnish details as to the specificities of the words in the Indictment, "but not limited to those events": Reply to the Prosecution contention that as currently framed, the Sesay Indictment sufficiently establishes the requirement of the existence of the "same or different crimes committed in the course of the same transaction" (referring to Rule 48(B) of the Rules of Procedure and Evidence).***

10. The defence refer the Trial Chamber to the submission in "the Motion" and herein above. The merit (or otherwise) of the assertions contained within paragraph 9 of "the Response" remains uniquely and peculiarly within the sole knowledge of the Prosecution until such time as they comply with "the Order".
11. Finally the Defence note the plea by the Prosecution to the Trial Chamber to decide that applications for "subsequent extensions" be dismissed as not constituting "good cause" (paragraph 10 of their response). The defence limits its response to expressing its concern at this unusual proposal.

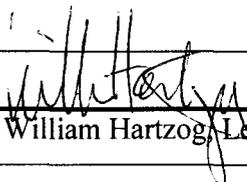
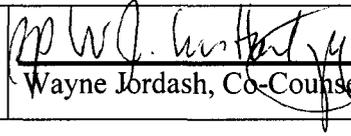
**CONCLUSION**

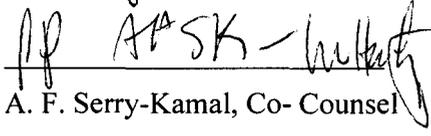
There are many persuasive and cogent reasons why Joinder, in a given case, might be appropriate. The converse is also true. It is submitted that the defence, when advancing their case at a stage of the Proceedings when the indictment has been found to be materially defective, ought to be afforded the protections and safeguards which arise implicitly from a remedy of that defect.

Respectfully submitted,

1679

Done in Freetown on this 3rd day of November 2003

 William Hartzog, Lead Counsel	 Wayne Jordash, Co-Counsel
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A. F. Serry-Kamal, Co- Counsel