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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Hon. Judge Benjamin Mutanga Itoe, Presiding Judge
Hon. Judge Bankole Thompson
Hon. Judge Pierre Boutet

Registrar: Robin Vincent

Date: 19th of January 2005

PROSECUTOR Against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No.SCSL-04-15-T)

RULING ON THE ISSUE OF THE REFUSAL OF THE ACCUSED SESAY AND KALLON TO APPEAR FOR THEIR TRIAL

Office of the Prosecutor:
Luc Coté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay:
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:
Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:
Andreas O'Shea
John Cammegh

Neil Gibson
17:38.

THE TRIAL CHAMBER of the Special Court for Sierra Leone ("Trial Chamber") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, Hon. Judge Pierre Boutet;

RECALLING that the Accused Issa Hassan Sesay and Morris Kallon refused to attend trial proceedings on the 12th of January 2005;

NOTING that the Trial Chamber on the 12th of January 2004 delivered an oral Ruling finding that the Accused Sesay and Kallon had waived their right to attend trial proceedings and acknowledging that their current Defence Counsel would continue to represent them in the proceedings with the consent of the Accused persons;

NOTING that the Trial Chamber indicated at that time that a reasoned written Ruling on this matter would be delivered in due course;

NOTING Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rule 60 of the Rules of Procedure and Evidence ("Rules");

THE TRIAL CHAMBER AFTER THE ORAL RULING OF THE 12TH OF JANUARY 2005 HEREBY ISSUES THIS REASONED UNANIMOUS RULING:

I. BACKGROUND

1. The Accused Sesay made his initial appearance on the Indictment on the 15th and 21st of March 2003 while the Accused Kallon made his initial appearance on the Indictment on the 15th, 17th and 21st of March 2003. The two Accused made a further appearance on the Amended Consolidated Indictment on the 17th of May 2004. The Accused Sesay and Kallon have been afforded the right to appear at their trial and have exercised that right during the trial proceedings throughout the first and second trial sessions in July and October 2004, respectively.

2. On the 11th of January 2005, the first day of the third trial session, Counsel for the Accused Sesay indicated that Mr. Sesay wished to make a statement to the Judges. While the

Chamber noted that there was no provision in the Rules for such a statement by an Accused, it stated that it would exercise its discretion to allow Mr. Sesay to make a statement. The Judges however warned him that they would not allow any challenges to the legitimacy or the jurisdiction of the Court.

3. When the Accused Sesay began making his statement, he referred to the amnesty provisions of the Lomé Peace Accord. The Court intervened and warned the Accused that this statement was not permissible. When the Accused refused to sit down and stop his statement, Justice Thompson ordered that he be removed from the Court since he was clearly being obstructive, abusive of the court process, and trying to impede the trial proceedings. At this time, the Accused Sesay also indicated that he would not attend proceedings if he could not make his statement.

4. After several adjournments were granted to Counsel for the Accused Sesay to permit him to consult with his client, a letter written by the Accused Sesay and purporting to contain essentially the statement he had wished to make orally was tendered and admitted as Exhibit Number 11. At this time, the Accused Kallon indicated that he also wished to respond to Mr. Sesay's letter. A letter written by the Accused Kallon was also tendered and admitted into evidence as Exhibit Number 12.

5. At this point, the Accused Sesay indicated to his Counsel that he did not wish to attend proceedings for the remainder of the afternoon. Counsel for the Accused Kallon indicated that Mr. Kallon also wanted to leave the courtroom with his co-Accused Sesay. The Presiding Judge Itoe sought clarification from the Accused Sesay as to whether he no longer wished to participate in the trial proceedings. Mr. Sesay did not provide a clear response and noted only that he has been attending trial proceedings for the previous two months of trial sessions and that he was not challenging the authority of the Court.

6. At the request of his Counsel, the Chamber granted a further adjournment to the morning of the 12th of January 2005 in order to permit the Accused Sesay and Kallon to consult with their lawyers and then to make an informed decision as to whether they wanted to continue to appear in Court or not.

7. On the morning of the 12th of January 2005, the Accused Sesay and Kallon did not appear in Court for their trial proceedings. Counsel for the Accused Sesay stated that Mr. Sesay did not

want to attend trial proceedings any longer but that he wanted his Defence Counsel to continue to represent him in the proceedings. Counsel for the Accused Kallon stated that Mr. Kallon had informed them that he did not want to attend trial proceedings any longer but that he wanted his Defence Counsel to continue to represent him in the proceedings. A letter written by the Accused Kallon and addressed to the Judges confirmed this information. It was tendered and marked as Exhibit Number 13.

8. Testimony was then heard from Mr. Barry Wallace, the Chief of Detention at the Special Court who indicated that both Mr. Sesay and Mr. Kallon had been informed of their obligation to attend their trial proceedings that morning but that both of them indicated that they did not wish to attend proceedings and gave no further reasons for their refusal to attend. He also testified that both Accused appeared to be fit and healthy and that there was no medical condition that would prevent their attendance in Court. He finally stated that he knew of no other circumstances justifying their refusal to attend court.

II. THE APPLICABLE LAW

9. As a matter of law, Article 17(4)(d) of the Statute pre-eminently governs the issue at hand. It provides that:

> (4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: ...
>
> (d) **T o be tried in his or her presence**, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it (emphasis added).

In effect, Article 17(4)(d) makes it a mandatory requirement for every person accused of crime within the jurisdiction of the Special Court for Sierra Leone to be tried in his or her presence.

10. Restating the general principle embodied in Article 17(4)(d), Rule 60 of the Rules provides thus:

> (A) An accused may not be tried in his absence, unless:
>
> (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or
>
> (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.
>
> (B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

11. In the Chamber's opinion, Rule 60 provides that, as a matter of law, the right of an accused person to be tried in his or her presence can be derogated from in two clearly-defined circumstances, to wit, (i) where he has made his initial appearance and has been afforded the right to appear at his trial but refuses to do so, or (ii) where, having made his initial appearance, he is at large and refuses to appear in court.

12. In its recent *Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days*, rendered on the 13th of July, 2004, the Trial Chamber held that a trial may proceed in the absence of the Accused person in certain circumstances, and in this regard, stated:

> "The Chamber therefore finds that though in essence trial in the absence of an accused person is an extraordinary mode of trial, yet it is clearly permissible and lawful in very limited circumstances. The Chamber opines that it is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification.[1]"

13. Reviewing the principles adopted in national law systems on this issue, The Chamber further stated:

> "Consistent with this reasoning, the Chamber also notes that in most national law systems, and especially in the common law jurisdiction, the general rule is that an accused person should be tried in his or her presence, but that exceptionally, courts of justice can have recourse to trial of an accused person in his absence where such an option becomes imperative but in limited circumstances. For

[1] Para. 8.

example, in Canada it is open to a court to continue to try an accused person in his or her absence where he or she was present at the start of the trial, a situation that is on all fours with the instant situation with which this Chamber is confronted as a result of the Third Accused's refusal to appear for his trial. The Chamber further notes that in civil law systems, the practice is widespread for accused persons to be tried in their absence subject to certain procedural and due process safeguards."[2]

14. Explaining the approach of International Tribunals to trials *in absentia*, the Chamber noted:

"From the Chamber's perspective, it is particularly noteworthy that the international law practice is on two levels: (i) the practice at the European Court of Human Rights ("ECHR") level and (ii) the practice at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") level. At the ECHR level, there is nothing in the jurisprudence of that Court to indicate that Articles 6(1) and 6(3)(c) of the European Convention on Human Rights providing basic legal guarantees for a person charged with crime have been construed in a manner suggesting the impermissibility of trial *in absentia*.[3] At the level of the ICTY and ICTR, the Chamber finds that the statutory provisions of these tribunals on the subject are akin to those of this Court, and that in so far as ICTY is concerned, to date no trial in the absence of an accused has been conducted. However, the ICTR has conducted one trial in the absence of an accused in the case of *Prosecutor v. Jean Bosco Barayagizwa*.[4] In that case, the Accused boycotted his trial on the grounds that he "challenged the ability of the ICTR to render and [sic] independent and impartial justice due, notably, to the fact that it is so dependent on the dictatorial anti-hutu regime of Kigali.[5]

It is abundantly clear to the Chamber that the jurisprudence, evolving or past, points to the legal sustainability of trial *in absentia* in certain circumstances."[6]

15. The Chamber, accordingly, emphasizes that it is settled law, nationally and internationally, that while an accused person has the right to be tried in his presence, there are circumstances under which a trial in the absence of the accused can be permitted. While due consideration must be given to ensure that all rights to a fair trial are respected, an Accused person charged with serious crimes who refuses to appear in court should not be permitted to obstruct the judicial machinery by preventing the commencement or a continuation of trials by deliberately being absent, after his initial appearance, or by refusing to appear in court after he has been afforded the right to do so, and particularly in circumstances as in this case, where no just cause, such as illness, has been advanced to justify the absence.

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[2] Para. 9.
[3] See *Ali Maleki v. Italy*, Communication No 699/1996 U.N. doc CCPR/C/667/669/1996 (27July 1979) of the UN Human Rights Committee and *F. C. B. v. Italy*, European Court of Human Rights, 40/1990/231/297 (26th June1991).
[4] Decision on Defence Counsel Motion to Withdraw, Case No ICTR-97-19-T, 2nd November 2000.
[5] Para. 10.
[6] *Id.*

III. THE MERITS OF THE APPLICATION

16. In making its oral Ruling, this Chamber was mindful in particular of the following circumstances with regard to the Accused Sesay and Kallon:

i. They made their initial appearances on the Indictment and a further appearance on the Amended Consolidated Indictment;

ii. They have exercised their right to appear at their trial throughout the first and second trial sessions in July and October 2004, respectively;

iii. That both Accused are represented by Counsel of their choice;

iv. They were provided with the opportunity to submit a written statement on the 11th of January 2005;

v. When both Accused indicated after the admission of the statements that they wished to absent themselves from the proceedings, the Chamber granted a request by Counsel for an adjournment to the 12th of January 2005 in order to allow Counsel to consult with the Accused.

vi. On the morning of the 12th of January 2005, the Accused Sesay and Kallon did not appear in court for their trial proceedings.

vii. Their Counsel informed the Chamber that their respective clients did not wish to attend trial proceedings any longer but wanted their lawyers to continue to represent them. The letter by Kallon confirmed this information.

viii. The Accused were informed of their obligation to attend the trial proceedings that morning by Detention authorities. Both replied that they did not wish to attend proceedings and did not give any further reasons for their refusal to attend.

ix. Both Accused appeared to Detention authorities to be fit and healthy and they have no medical condition that would prevent their attendance in court.

In the light of the foregoing, We are satisfied that the Accused Sesay and Kallon have waived their right to be present at their trial.

The Chamber takes note, as is also the case with the Second Accused, Kallon, as evidenced by Exhibit 13, of the verbal indication in Court by the Counsel for the First Accused Sesay, Mr. Jordash, that his client has mandated him to continue representing him in his absence.

THE TRIAL CHAMBER ACCORDINGLY, CONSISTENT WITH THE ORDERS MADE ORALLY ON THE 12TH OF JANUARY 2005 ON THIS ISSUE

ORDERS AS FOLLOWS:

1. That the trial proceeds in the absence of the two Accused Persons pursuant to Rule 60 of the Rules of Procedure and Evidence.

2. That Mr. Wayne Jordash and other members of his Defence Team continue to represent the said First Accused, Sesay, and that Mr. Shekou Touray and other members of his Defence Team, in the light of Exhibit 13, continue to represent the said Second Accused, Kallon, during the proceeding against the said Accused persons.

3. That the Chief of the Detention Facility of the Special Court maintains on a daily basis, a record of the waiver of the Accused, Sesay and Kallon, to appear in Court during each trial session of the RUF group of indictees.

Done at Freetown, Sierra Leone, this 19th day of January 2005

Hon. Judge Pierre Boutet | Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Trial Chamber | Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]