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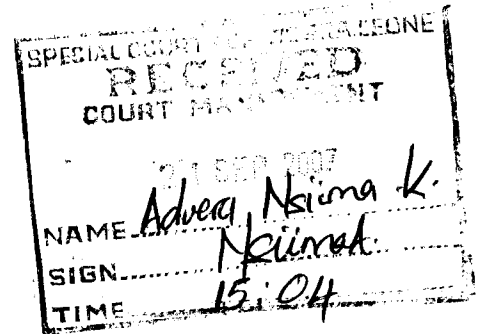
THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

Before: Justice Benjamin Mutanga Itoe, Presiding
Justice Bankole Thompson
Justice Pierre Boutet

Registrar: Herman Von Hebel

Date: 21 September 2007



THE PROSECUTOR

-v-

MOININA FOFANA and ALLIEU KONDEWA

SCSL-04-14-T

PUBLIC

JOINT SUBMISSIONS OF THE PROSECUTOR
AND THE FOFANA DEFENCE ON SENTENCING

Office of the Prosecutor:

Stephen Rapp
Christopher Staker
James Johnson
Joseph Kamara

Counsel for Fofana:

Victor Koppe
Michiel Pestman
Arrow Bockarie
Steven Powles

Counsel for Kondewa:

Charles Margai
Ansu Lansana
Yada Williams

SUBMISSIONS

1. The Prosecutor and Counsel for Moinina Fofana (the “Defence”) submit the following in order to provide the Trial Chamber with a clearer understanding of the facts in the case of Joseph Nzabirinda,¹ cited by the Defence and the Prosecutor during the CDF Sentencing Hearing.²
2. In support of its argument that aiding and abetting a crime from a distance, both temporally and geographically, amounts to a lower degree of contribution which should be reflected in the sentence, the Defence made the following submission:

[I]n terms of [Nzabirinda’s] role as an aider and abetter, he was present at the scene and an approving spectator and it was on that basis that he was found to be an aider and abetter and therefore, we say, a more serious aider and abetter of the crimes of murder in that case than those found against Moinina Fofana.³

3. The Prosecutor responded to the Defence submission by stating that in *Nzabirinda*, the accused had not been present at the scene of the killing.⁴ This was based upon his personal recollection of having negotiated the guilty plea with defence counsel for Nzabirinda.⁵ Throughout those negotiations Nzabirinda maintained that he had not been present when any killings were committed. This position is set forth in the *Nzabirinda* Sentencing Judgment where it is reported that “he was not present at the crime scene, but at the preparatory meeting for that crime. He was, therefore, not physically present at the venue of the murder, but at the meeting and at the roadblocks where those crimes were prepared”.⁶ Nevertheless, at sentencing the ICTR Trial Chamber decided that his proximity to the murders vitiated Nzabirinda’s plea of mitigation:

[T]he Chamber recalls that Joseph Nzabirinda admitted that Pierre Murara was killed by the *Interahamwe* near the location where the meetings were held and where he was present as an “approving spectator” and that, in appearing beside the killers at the roadblock, he encouraged the murder by Mugenzi of Joseph Mazimpaka near the roadblock that he was manning and while he was present. Based on these admitted facts, the Chamber considers that Joseph Nzabirinda’s presence as an “approving spectator” in the vicinity of the crime scenes, encouraged the preparation and the

¹ *Prosecutor v. Nzabirinda*, ICTR-01-77-T, Sentencing Judgement, 23 February 2007 (the “*Nzabirinda* Sentencing Judgement”).

² *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Trial Transcript, 19 September 2007 (the “Trial Transcript”), pp. 95–97.

³ Trial Transcript, p. 68.

⁴ *Ibid.*, p. 95.

⁵ The present SCSL Prosecutor was ICTR Chief of Prosecutions from 5 May 2005 to 8 January 2007.

⁶ *Nzabirinda* Sentencing Judgement, para. 83 (internal citations omitted)

commission of the murders of Pierre Murara and Joseph Mazimpaka. Accordingly, the Chamber rejects the Defence arguments that the fact that Joseph Nzabirinda was not physically present at the venue of the murder is a mitigating factor as *it is established that he was in the immediate vicinity of the crime scenes* and knew that he would encourage the commission of the crimes.⁷

4. The Defence submission at the CDF Sentencing Hearing was properly based upon the following legal principle stated and applied in *Nzabirinda*:

Unlike other forms of aiding and abetting, “criminal responsibility as an ‘approving spectator’ does require actual presence during the commission of the crime or at least presence in the *immediate vicinity of the scene of the crime*, which is perceived by the actual perpetrator as approval of his conduct.”⁸

5. The submissions of both parties were made in good faith, and they now ask the Trial Chamber to take from the *Nzabirinda* Sentencing Judgement whatever is appropriate to the instant case based upon this clarification of the facts and the law.



Stephen Rapp
Prosecutor



Steven Powles
Counsel for Moinina Fofana

⁷ *Ibid.*, para. 86 (internal citations omitted) (emphasis added).

⁸ *Nzabirinda* Sentencing Judgement, para. 18 (internal citations omitted) (emphasis added).