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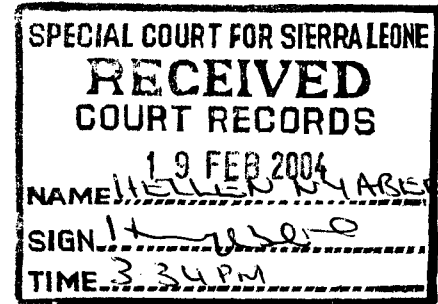
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SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson
Judge Itoe
Judge Boutet

Registrar: Mr Robin Vincent

Date Filed: 19th of February 2004



THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL – 2004 – 14 – PT

**DEFENCE RESPONSE TO PROSECUTION REQUEST
FOR LEAVE TO AMEND THE INDICTMENT AGAINST
SAMUEL HINGA NORMAN, MOININA FOFANA
AND ALLIEU KONDEWA**

Office of the Prosecutor

Luc Cote
James C. Johnson
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Defence Counsel

James Jenkins-Johnston
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Quincy Whitaker

INTRODUCTION

1. The Defence for Chief Samuel Hinga Norman files this response to the 'Prosecution's Request for leave to Amend the Indictment against Samuel Hinga Norman et al' dated the 9th day of February 2004 seeking leave to file amended indictments pursuant to Rules 50 (A) and 73 (A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.
2. The Prosecution argues that the proposed indictment should be granted as it is justified both in law and fact for the following reasons: that the proposed indictment incorporates new and additional evidence which was not available at the time of submitting the current indictments for approval, that there has been no undue delay in bringing the amendment and that the filing of the proposed indictment will not prejudice the rights of the accused.
3. The Prosecution further argues that the decision to grant an indictment is discretionary and must be considered against the overall interests of justice taking into account the circumstances of the case and the right of the accused to a speedy trial.
4. The Prosecution argues that the factual basis for the motion arose from on-going investigations which reveal that the accused has allegedly committed crimes falling within the jurisdiction of the Court; namely, sexual offences ranging from rape, sexual slavery and forced marriages committed against women abducted from various parts of southern and eastern provinces of Sierra Leone.
5. Further, the Prosecution seek to expand the time frame of the alleged commission of the crimes as a result of evidence that has apparently recently come to its possession.
6. The Prosecution submits that the relevant principle that the Court should consider is whether the Prosecutor acted without undue delay in submitting the request and whether amendments will cause delay in the trial of the Accused.
7. The Prosecution submit they have acted without undue delay having regard to the complexity of the case and the challenges related to investigating crimes of such complexity. The Prosecution suggest it had been difficult to obtain new evidence as a result of the fears expressed by potential witnesses.

8. Further the Prosecution contend that that it was appropriate “in the interest of judicial economy” for them to wait to file the instant request until after the decision in the Prosecution Motion for Joinder had been rendered to “avoid filing separate motions for each accused as would have been the case if the application was made earlier”
9. Further, the Prosecution contends that since the proceedings are at pre-trial stage, the amendment would not cause undue delay to the trial of the accused and his eventual preparation for an adequate and effective defence.
10. Additionally the Prosecution contends that the proposed amendment is in the overall interest of justice having regard to its obligations to prosecute to the full extent of the law coupled with its ongoing investigations. It is submitted that no serious prejudice will result from the amendments having regard to its timeliness and the stage at which it is made.

THE LAW

11. The Defence agree with the statement of relevant legal principles applicable to the Court’s determination of the instant Request as set out at paragraph’s 7 – 9 inclusive of their Request. The Defence accepts the relevance of the jurisprudence of the ICTY and ICTR to the Court’s decision. However it is submitted that there are distinct principles applicable to the jurisprudence of the Special Court that have already emerged from its decisions. The Appeals Chamber have held that the right to an expeditious trial is to be given greater emphasis at the Special Court than at the ICTY or the ICTR (see judgment of SCSL Appeals Chamber in *Decision on the Applications for a stay of proceedings and denial of right to appeal* 4th November 2003).
12. The Defence submits that the Prosecution’s Request seeking leave to file the proposed amended indictment should be dismissed in its entirety. It is submitted that on a proper analysis of the facts, the proposed amendments will severely prejudice the rights of the accused by unduly delaying his trial and by denying him the opportunity to have a fair trial as a result of the imminent determination of preliminary legal issues by the Appeals Chamber and/or amounts to an abuse of the process of the court for the aforesaid reason.
13. Further the Defence submits that the Prosecution have not demonstrated they have acted without undue delay, particularly in view of their admission that they withheld the instant Request for

reasons of “judicial economy”. By reason of the foregoing matters it is submitted that the proposed amendments are therefore not in the overall interest of justice.

14. PREJUDICE TO THE ACCUSED RIGHTS

(a) Undue delay to the accused’s trial

The proposed amendments will undoubtedly result in delay to the accused’s trial as they fundamentally alter the case that he has to meet; geographically, temporally and in terms of the nature of the charges that he faces. Although no trial date has been set, discussions with the Court and the Registry have always proceeded on the basis that the trial of the accused would commence shortly after the opening of the Court which is scheduled for the 10th of March 2004 and the Status conference in the accused’s case (where it is assumed a trial date would be set) has been listed for the 4th of March 2004. it is submitted that it is disingenuous of the Prosecution to assert (at paragraph 24 of their Request)that “the issue of the amendments delaying trial dose not arise”.

15. The Appeals Chamber have held that the United Nations chose to establish the Special Court on a different model from other tribunals so as to avoid undue delay in holding and conducting trials (see judgment of SCSL Appeals Chamber in *Decision on the Applications for a stay of proceedings and denial of right to appeal* 4th November 2003 at paragraph 9 *et seq*). The Appeals Chamber found that the resolution of the Security Council and the consequent Report of the Secretary-General highlighting these concerns were reflected in the SCSL’s Statute and Agreement “most notably in the provision for three year terms for its Prosecutor, Registrar and all its judges, an indication that this is an appropriate time frame in which to deal at least with the initial indictees” and that consequently the “judges must give full force and effect to the need for an expeditious trial”. The Appeals Chamber further held that “the international community, the people of Sierra Leone and their alleged victims all have a concomitant interest in an expeditious determination of guilt or innocence” (*supra* at paragraph 11).

16. This application of this principle was given practical illustration in the decision of the President of the Appeals Chamber in the *Decision on Modification of the Conditions of Detention* (26th of November 2003) where he stated at paragraph 15 that “the very act of bringing an indictment implies that the prosecution has a case that is almost ready for trial and can be made ready within 6 to 9 months of the date of arrest, a time that is probably the minimum necessary to allow defence preparation. Arguments that concern delay in trial fixtures considerably beyond that time period

will be carefully scrutinised to ensure that both parties are genuinely working towards trial at the earliest practicable time.”

17. The current indictment against the accused was filed on the 7th of March 2003 and the accused has been in custody since his arrest on March 10th 2003. On the timetable envisaged by the president therefore the accused’s trial ought properly to have commenced at the beginning of this year. Thus even the assumed trial date in March 2004 breaches the expeditious trial that was envisaged when the Special Court was created. However clearly any further delay occasioned by this late expansion of the case that the accused has to meet is contrary to the founding principles of the Special Court and applying the “careful scrutiny” that is required must clearly lead to the denial of the Prosecution’s Request.
18. Since their instruction, the Defence team on behalf of Chief Norman have prepared the case and directed defence investigations on the basis that the allegations faced by him relate to the period between 1 November 1997 and 1 of April 1998, a distinct period of five months. The proposed amendment seeks to expand this five month period to 33 months. This expanded period encompasses an entirely new set of issues in terms of the political situation in Sierra Leone at the time and the concomitant role of the accused as a member of the government of Sierra Leone. Witnesses have been sought and interviewed in Sierra Leone, the United Kingdom and the United States of America on the basis of the five month time frame of the allegations contained in the current indictment. Specifically, no investigations have been undertaken into the period post the Lome Accord.
19. Clearly the entire basis and strategy of the defence preparation will have to be fundamentally altered if the proposed amendments are allowed; effectively placing the defence back at the starting point of its case preparation (which was considered by the President of the Appeals Chamber to require a minimum of 6 – 9 months to conduct properly). Not only will detailed instruction from the accused have to be taken for an additional 28 month period but witnesses throughout Sierra Leone will have to be traced. Further due to the accused’s position as a Minister in the Sierra Leonean government during the relevant period it will be necessary to obtain evidence from many senior officials and military personnel in foreign jurisdictions notably the UK, the USA and Nigeria. Many of these witnesses are high ranking military and political officials who may well not be immediately available to be interviewed by the Defence team. There are significant

budgetary implications for the Defence budget as the proposed amendments will involve revisiting the USA at least to conduct further investigations.

20. The proposed amendments further add numerous specific incidents in areas and districts where the accused previously had not been accused of any crime. This is certainly not a case such as that of *Prosecutor v Karemera* (ICTR-98-44-AR73 relied on by the prosecution at no. 6 of their authorities) where the Prosecution are in effect eliminating general allegations and substituting them with specific allegations so that the fairness of the trial is enhanced by clarifying the prosecution case (*supra* at paragraph 26). The proposed indictment charges entirely new incidents into which no investigations have to date been undertaken. In order to meet these allegations the defence team would require investigations to be undertaken into entirely new geographical areas and embark on locating an entirely new set of defence witnesses.
21. Further the proposed indictment alleges crimes of sexual violence for the first time against the accused. No such allegation has ever previously been levelled at the accused and thus represents another entirely new area on which thorough investigation will have to be conducted. By the nature of the allegations such investigations will necessarily have to be conducted sensitively and may take a considerable period to fully investigate. The difficulties which the Prosecution suggest they have encountered in terms of witnesses reluctance to come forward apply equally to the defence. If the Prosecution were indeed acting with due diligence in obtaining the evidence relating to such crimes then it suggests that a considerable period indeed would be required by the defence acting equally diligently to investigate the new allegations thoroughly. Further the proposed amended charges will potentially require the formulation of new investigation techniques and principles and which would in turn affect the overall case strategy of the defence team.
22. The Defence further submits that the proposed amended charges do not comply with the obligation under the SCSL Statute that the accused shall be promptly informed of the nature of the charges against him. The purpose of this right is to enable an accused to know the case that he has to meet and to conduct investigations as timely as possible. The accused has been denied the opportunity to seek out witnesses to these new allegations at the earliest stage possible which it is submitted inevitably prejudices his right to fair trial.
23. Further the additional witnesses whom will inevitably have to be called to support the raft of new allegations will add considerably to the time period of the trial. The Defence however have not

been provided with any of the supporting witness statements that are to be relied upon to justify the proposed amendments. This is not a case such as that of the *Prosecutor v Musema* (ICTR-96-13-T 6th of May 1999 relied upon by the prosecution at no. 7 of their authorities) where the Defence were given the witness statements relating to the proposed new charges four months before the application to amend was made.

24. The Defence submits that if its right to adequately prepare its defence is upheld then it will necessarily require a delay to the start of any trial by at least 6 months. It is understood that the three year mandate for which the operation of the court has been budgeted, and on which such emphasis was placed by the President of the Appeals Chamber, will expire in July 2005. Estimates of trial length from the Prosecution have usually been in the region of 6-9 months. Thus, even with a trial commencing in March, any appeals are not likely to take place until spring 2005. It is submitted therefore that the grant of the Prosecution's Request will of necessity lead to the breaching of the three year mandate set for the Special Court by the UN and enshrined in its Statute. It is submitted that the grant of an application with such consequences cannot be a lawful exercise of the court's discretion.

(b) Denial of fair trial/abuse of process

25. Further to the above the accused submits that he will be denied the opportunity to have a fair trial if the proposed amendments are allowed and that further the request amounts to an abuse of the process of the court in the light of the fact that the hearings determining the Preliminary Motions have already taken place.

26. In November 2003 various Preliminary Motions filed on behalf of the Defendants were heard by the Appeals Chamber. The strategy concerning the participation in these Preliminary Motions by the Defence team on behalf of Chief Norman was necessarily determined according to the case that they had to meet. Thus it was argued on behalf of the accused that the charge alleging the recruitment of Child Soldiers under 15 was bad in law as it was not an international crime during the relevant period of the indictment i.e. 1 November 1997 – 1 April 1998. The point at which such recruitment became an international crime after that period was irrelevant to the charges faced by the accused and for that reason concessions were made concerning when the prohibition crystallised into a crime.

27. The proposed amendments to the indictment necessarily expand the charge of the recruitment of child soldiers to the new indictment period, namely 1 November 1997 – 1 August 2000. It is submitted that the prosecution will at the very least gain an improper “tactical advantage” as a result of having delayed the current Request to amend the indictment until after the Preliminary Motion hearings. Alternatively the Request amounts to an abuse of the process of the court as it is an attempt to capitalise on concessions made during the course of the hearings when the accused faced an entirely different case.
28. If the proposed amendment is granted then clearly it would be necessary to re-hear all the Preliminary Motions (and potentially new Preliminary Motions based on the new charges) resulting in a vast waste of resources and creating considerable delay. Similar considerations to the preliminary Motion on Child Soldiers arise in relation to the Preliminary Motion on the applicability of the Lome Amnesty. The approach of the Defence team was predicated upon there being no allegations post-Lome and thus the accused would benefit from the amnesty if anyone was found able to. However the expansion of the indictment to include the post-Lome requires such an approach to be entirely rethought. On the basis of the amended indictment substantial submissions on behalf of the accused at any re-hearing of Preliminary Motion may well be appropriate on this issue.
29. Further, as a result of the prosecution’s decision not to prefer the instant Request before the hearing for joinder “in the interests of judicial economy” the Defence have been deprived of considering whether they wish to object to joint trial on these new allegations and over the expanded time scale.
30. The Defence submits that the integrity of the process of the Special Court is a highly relevant factor to be taken into account in exercising the court’s discretion as to whether or not to grant the amendments sought.

WHETHER THE REQUEST IS TIMELY

31. It is submitted that the prosecution have not shown that this Request is timely and that they have acted with due expedition in the light of their admission that this request was held back to await the decision on joinder for reasons of “judicial economy” (Request para. 21). It is submitted that the prejudice caused to the Defence by delaying this Request in view of the imminent trial date and scheduled Status conference clearly outweighs any advantage to the court (or the prosecution) in

“avoid[ing] filing separate motions for each accused as would have been the case if the application had been made earlier”. The Defence notes that no mention of substantive amendments to the indictment was made at the application for joinder.

32. It is submitted that, as with the case of *Karemera* (*supra* para.20) very little information has been provided by the Prosecution regarding the diligence of their investigations so that it is not possible to conclude that they have demonstrated the due diligence necessary for their Request to succeed. There is for instance no specific information as to why the Prosecution now seek to include the offences of a sexual nature having regard to the fact that it had preferred sexual offences in other indictments against other accused persons.
33. The Defence submits that the Prosecution commenced investigations long before the arrest of the accused on the 10th March 2003. The Request seeks to add the fresh charges two years after the commencement of investigations by the Office of the Prosecutor. In effect, the Prosecutor had more than ample time to have brought these charges against the Accused¹. Furthermore, it is submitted that diligent prosecutors would have ensured that investigators had fully interviewed potential witnesses with a view to ascertaining ‘the full extent of the Accused’s culpability and to be able to fully prosecute the Accused’. No explanation has been provided as to why this was not done in this case.
34. In reaching a conclusion as to whether or not the Prosecution had been diligent in bringing this motion, the Defence invites the Trial Chamber to take note of the peculiar circumstances of the case in Sierra Leone. The trials are held *in situ* and the investigations have been conducted within Sierra Leone, a situation markedly different from those which face the ICTR and ICTY. The Prosecution has unrestricted access to resources; human and material and also unhindered access to the length and breath of Sierra Leone; where its offices are situated and where the alleged crimes have been committed and in addition is the seat of the Court. The above-listed factors provide a reasonable basis for the Prosecution to have fully utilised the resources open to his Office to expeditiously bring charges against the Accused having regard to the exigencies in time for the mandate of the Special Court. Prudent Investigators within such a small country should have concluded such investigations within record time and expedite these trials to speedy conclusion having regard to the mandate of the Court.

Appeals Chamber Decision in Prosecutor v Bizimungu dated the 12th February 2004 where this question was also considered by the Appeals Chamber

35. The amendments sought consist primarily of expansions in terms of the charges preferred and clarifications in terms of the time and places of alleged commission of offences. The ICTR Appeals Chamber noted in the *Bisimungu* case, that such an amendment would be granted had the Prosecutor sought to solely add particulars to its general allegations because such amendments would have positive impact on the fairness of the trial. In this case, the Prosecution expands the scope of the current indictment in a manner prejudicial to the Accused having regard to his fair trial rights.
36. The Defence further submits that the complexity of the case and the challenges posed to investigations must be counterbalanced with the rights of the accused to a fair trial (see the decision of the Appeals Chamber in the *Prosecutor v Casimir Bizimungu et al* ICTR-99-50-AR50 12th of February 2004, confirming the Trial Chamber's decision to refuse the prosecution leave to amend). The Defence further invites the Trial Chamber to look closely at the proposed amendments and determine the extent to which the expanded changes would necessitate that the Accused be given adequate time to prepare his defence. The effect would be to ask for more time to examine the offences preferred, whether or not the form of the indictment should be challenged and also possibly the question of raising threshold jurisdictional questions that may arise as a result of the preferment of new offences.
37. The question of judicial economy and resources have not been give due consideration by the Prosecution in their Request. It is submitted that the proposed amendments would affect the status conference and the pre-trial briefs that have been listed to take place in early March. Exercising discretion in favour of granting the amendments sought would re-commence the process *denouveau* and would necessitate fresh procedures to be initiated on the part of the parties and of the Trial Chamber which would not only be time consuming, but could have been avoided had the Prosecution conducted their investigations with due diligence at the appropriate stage.
38. **THE INTERESTS OF JUSTICE**
- The Defence submit that for the foregoing reasons, permitting the proposed amendment is not in the overall interest of justice. It is insufficient for the Prosecutor to merely assert that "it is of the utmost importance" that he be permitted to amend the indictment. It is further asserted in paragraph 30 of the Request that "having regard to the efforts made by the Prosecutor to amend the indictment within a reasonable time" no serious prejudice will be caused to the accused. Not only

is this assertion a *non-sequitar*, but it is submitted that there is no or no adequate evidence before the court as to what efforts were made by the Prosecution and whether they did apply to amend within a “reasonable time” of obtaining the evidence. The court has not been provided with any dates or material particulars as to when the evidence supporting the various new charges came to the knowledge of the Prosecution and why in each case it had only recently become available to them.

39. It is submitted that general assertions that the Prosecution have acted with due diligence are not a sufficient basis on which the court can exercise their discretion as the court itself must be satisfied that the request is made expeditiously. The Defence submits that the view of the Appeal Chamber that “the international community, the people of Sierra Leone and their alleged victims all have a concomitant interest in an expeditious determination of guilt or innocence” (*Decision on Motion on Denial of Right to Appeal, supra* at paragraph 11) provides highly relevant guidance as to where the overall interest lie in the matter currently before the Court.


CONCLUSION

40. The Defence submits that on a proper application of the relevant principles, which are herein before set out, this Request should be dismissed in its entirety as to allow it would inevitably prejudice the accused’s right to an expeditious trial and his right to a fair trial. Further the Prosecution have failed to demonstrate that they have acted with the requisite due diligence in bringing the said Request.

Freetown and London, 19th February 2004.

For the Defendant:

James Blyden Jenkins-Johnston
Lead Counsel



Sulalman Banja Tejan-Sie
Co-Counsel

Quincy Whitaker
Co-Counsel
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DEFENCE INDEX OF AUTHORITIES

1. SCSL Appeals Chamber in Decision on the Applications for a Stay of Proceedings and Denial of the Right of Appeal dated 4th November 2003
2. SCSL Decision of the President, on the Modifications of the Conditions of Detention dated the 26th November 2003
3. ICTR Prosecutor v Karemera (ICTR TC 3) DATED THE 13TH February 2004
4. Prosecutor v Musema (ICTR -96-13-T) dated the 6th May 1999 relied
5. ICTR Appeals Chamber in the Prosecutor v Casmir Bizimungu et al, ICTR -99-50-AR-50 dated the 12th day of February 2004