

SPECIAL COURT FOR SIERRA LEONE**The Trial Chamber**

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

Registrar: Robin Vincent

Date: 7 March 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL-04-14-T

DEFENCE REQUEST FOR "STAYED" WITNESS INDEXING**Office of the Prosecutor**

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DEFENCE REQUEST FOR “STAYED” WITNESS INDEXING

I. INTRODUCTION: DEFENCE REQUEST

1. Pursuant to Rules 54 and 73(A) of the *Rules of Procedure and Evidence of the Special Court for Sierra Leone (the RPE)*, the First Accused hereby files this application requesting the Trial Chamber, among other things, to issue an order to the Prosecutor to provide to the Court and the Defence, within a fortnight of the date of the said order and in any case not later than 31 March 2005, whichever is the earlier, a comprehensive list of all prosecution witnesses who have already given testimonies in Court as to, and of all prospective prosecution witnesses who will be giving or are likely to give testimonies in Court as to, the respective aspects of the “stayed” portions of the consolidated indictment(**the CI**) as are set out in paragraph 38 of the Trial Chamber’s Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment of 29 November 2004(**the Staying Decision**)¹, such listed witnesses to be clearly individually index-linked to the respective aspects of every such “stayed” portion of the CI as to which they respectively have given, or are required or likely to give, such testimonies.

¹ *Prosecutor v. Norman, Fofana, and Kondewa*, Case No. SCSL-04-14-T, “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 29 November 2004, Doc. 282(RP. 10888-10894). SEE ALSO:

Ibid., “Separate Concurring Opinion of Judge Bankole Thompson on Decision on First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 29 November 2004, Doc. 285(RP. 10899-10909).

Ibid., “Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on the Motion for Service and Arraignment”, 29 November 2004, Doc. 293(RP. 10971-11011).

2. The First Accused submits that the said “**stayed**” **witness indexing** is necessary for the purposes of relevant defence investigations and for the preparation and conduct of the defence and of the trial, especially in respect of the First Accused.

II. BACKGROUND PROCEDURAL HISTORY

3. In its deliberations on the relevant founding Motion,² the Trial Chamber identified certain portions of the consolidated indictment (**the CI**) “that are material and embody new factual allegations and substantive elements of the charges” as against the First Accused, which the Majority Decision then ordered to be “stayed” as against him as a precedent event in putting the Prosecution “to its election” as to whether to either “expunge completely” from the CI such “identified portions” thereof or “seek an amendment” thereof in respect of those identified portions, and in either case upon leave to be sought from the Trial Chamber(See the Order therein).
4. The new factual allegations and elements were thus identified in the CI as not having been included in the previous separate individual indictment against the First Accused and fully set out *ipsissima verba* in both paragraph 19 of the Majority Staying Decision and paragraph 63 of **the Dissenting Opinion** appended thereto(See footnote 1 above). The said Staying Decision then summatively characterises them in its first paragraph 30 as generally material and substantive; and it then proceeds in its paragraph 38 to select the most crucial ones among them to be “stayed” pending execution of the aforesaid “election” by the Prosecution, as follows:

“30. Upon close analysis of the Consolidated Indictment, there are clearly new factual allegations adduced in support of existing confirmed counts, as well as new substantive elements of the charges that were not in the Initial Indictment of the First Accused. In the opinion of the Trial Chamber, these changes do not appear to be simply ‘semantic’, as alleged by the Prosecution in their Motion for Joinder, but rather are material to the Indictment. While some of the

² Ibid, (First Accused’s) “Motion for Service and Arraignment on Second Indictment”, 21 September 2004, Doc. 202 (RP. 9572-9577).

differences between the two indictments simply provide greater specificity, and provide background facts, many of the changes are, however, material to the Indictment. Such as **the addition of geographic locations** in paragraphs 23 to 27 of the Consolidated Indictment, that introduce new districts, such as Bonthe and Moyamba; and **the extension of temporal jurisdiction** for some counts from April 1998, as outlined in the Initial Indictment, to December 1999 in the Consolidated Indictment. In addition, there are **new substantive elements of charges** in paragraphs 24 to 27 and 29 of the Consolidated Indictment, that are material, and include the charges of unlawful arrest and detention, ‘conscriptioⁿ’ of children, personal injury and extorting of money from civilians”(Emphases added).

“38. In accordance with the Accused’s right to a fair trial and in the interests of justice, the Trial Chamber will stay the following portions of counts of the Consolidated Indictment, that constitute material changes to the Indictment against the First Accused. The remainder of the Indictment, excluding **the stayed portions**, constitutes a valid Indictment against the Accused. **The stayed portions** of the Indictment are outlined in brackets [sic] in the text below”(Bold emphases added).

It is clear that the Staying Decision did not merely order the identified portions to be stayed at some time in the future, but that **it in fact actually automatically stayed them** by its sole Order therein.

5. There then followed a bewildering progeny of proceedings issuing from the Prosecution and Defence alike, with the Prosecution obviously accepting the “election” invitation even as it also sought to challenge the Staying Decision.
6. By leave granted it on 15 December 2004, the Prosecution filed an appeal³ against the said Staying Decision on 12 January 2005. And by similar leave granted him on 16 December 2004, the First Accused filed his interlocutory appeal⁴ against the same Decision on 17 January 2005. Both appeals were pursuant to Rule 73(B) of the RPE. Additionally, however, the Prosecution

³ Ibid, “Prosecution Notice of Appeal Against the Trial Chamber’s Decision of 29 November 2004 and Prosecution Submissions on Appeal”, 12 January 2005, Doc. 316(RP. 11232-11259).

⁴ Ibid, “Interlocutory Appeal by First Accused Against the Trial Chamber’s Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004”, 17 January 2005, Doc. 318(RP. 11297-11325).

sought further leave on 8 December 2004 to amend the CI in the proposed manner as against the First Accused, which leave has not however been granted as yet in view of Rule 73(C) and the aforesaid appeals still pending before the Appeals Chamber. Meanwhile, though, the various appeals and leave applications were duly attended by the usual exchanges of responses and replies between the Prosecution and Defence in respect thereof.

7. This was the state of the procedural background history when the Prosecution applied to the Trial Chamber by oral motion (**the Moyamba Crime Base Motion**) on 25 February 2005, and was allowed to proceed without need of the usual written motion and attendant exchanges on complex and/or crucial issues at the trial, thereby resulting into the Trial Chamber's Decision thereon of 1 March 2005(**the Moyamba Crime Base Decision**)⁵, to which the learned Presiding Judge appended his **Dissenting Opinion**⁶. The Prosecution was seeking in this application to be allowed to lead a new batch of witnesses in evidence in relation to a particular set of the aforesaid "stayed" portions of the CI, even though they were currently subject of appeal before the Appeals Chamber. Its explanation was that it was not in a position to go ahead with other sets of witnesses at that stage but only with those who would testify as to that particular set of "stayed" portions of the CI. It submitted, furthermore, that no harm or prejudice would thereby be occasioned to the First Accused should the evidence to be adduced turn out later on not to be part of the case against him as a result of determination of the respective appeals before the Appeals Chamber. And that, in any case, the Prosecution had reached some "resolution" with Court Appointed Counsel for the First Accused to proceed with the said set of "stayed" witnesses. However, Defence participation in the so-called "resolution" seems to have included the proposal that proffered sets of witnesses be first cross-examined on behalf of the Second and Third Accused, "with **the option** for Court Appointed Counsel for the First

⁵ Ibid. "Decision on Presentation of Witness Testimony on Moyamba Crime Base", 1 March 2005, Doc. 354(RP. 12238-12242).

⁶ Ibid, "Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Decision on Presentation of Witness Testimony on Moyamba Crime Base", 1 March 2005, Doc. 362(RP. 12360-12371).

Accused to **cross-examine if they ‘choose’ to do so**”(See para. 5 of the said Moyamba Crime Base Decision; all emphases added).

8. The Trial Chamber then decided “that the trial proceedings will continue against the Accused persons and that the Prosecution may present witnesses to give testimony on areas relating to the Moyamba crime base and **that the Trial Chamber will make a determination on the relevance of this testimony to the First Accused upon the rendering of the Appeals Chamber’s Decision on this matter**” (p. 5 of said Decision; all emphases added). The potentially wide scope of this Decision was seen on 3 March 2005 when a Court Appointed Counsel for the First Accused sought clarification as to whether, in view of the aforesaid “**option to cross-examine if they ‘choose’ to do so**”, it would be permissible to seek leave on his behalf to defer or postpone cross-examination of the witnesses who would be testifying as to the alleged “Moyamba crime base” incidents: he was promptly told by their learned Justices of the Trial Chamber that such a proposal would be a “negation” of the said Decision.

9. Thereafter, the First Accused applied for leave to appeal against the said Decision.⁷ Among some five sets of grounds for seeking that leave is his submission in para. 9(c) of the leave application that the said Decision is in breach of Rule 73(C) of the RPE and so was taken without jurisdiction and was accordingly invalid, null and void.

10. Some of the wider issues of potential objection to the said Decision are even quite spiritedly canvassed in the Dissenting Opinion appended thereto, especially in paras. 33, 34, 38 and 39 thereof, as follows:

“33. I do so hold because to my mind, even arguments based on the ‘interests of justice’, ‘judicial economy’ or ‘expeditiousness’ cannot and should not, given the circumstances of this case, be countenanced or sustained, for, upholding them with a view to granting this Motion, even though they ordinarily are traditionally

⁷ Ibid, “Request by First Accused for Leave to Appeal Against the Trial Chamber’s Decision on Presentation of Witness Testimony on Moyamba Crime Base, 1 March 2005,” 4 March 2005, Doc.

accepted criteria in the administration of justice, would, in these particular and peculiar circumstances, occasion a violation of the law to the detriment of the 1st Accused.

“34. The question to be answered here is, how can we today start taking evidence in relation to the Moyamba crime base when Our Majority Decision supported by the Separate Concurring Opinion, ordered a stay of some major elements of the crimes alleged to have been committed in the Moyamba crime base when indeed the determination of this contention is sub judice?”

“38. For these reasons, I am of the opinion that to continue with the presentation of witness testimony on areas of the Indictment that are in dispute and are being considered on appeal by the Appeals Chamber would not be in the interests of justice. [I]ssues of fairness to the 1st Accused and the avoidance of any prejudice to the case for Accused Persons and their Article 17 Statutory rights, are paramount.

“39. I believe that the right of the First Accused to a fair trial would be violated should the trial proceed and should witnesses testify on that venue of the Indictment that is contested and on appeal.”

III. DEFENCE PLIGHT.

11. In view of the foregoing considerations, especially the stipulations in Rule 73(C) of the RPE and the fact of the pending appeals in respect of the “stayed” portions of the CI, the First Accused could understandably have considered himself (and so far he actually did so consider himself) entitled to a legitimate expectation that, in all the circumstances, the Prosecution would choose to defer or postpone presentations of “stayed” portion testimonies at least up until after final determination of the said appeals. And that, in that case, it would be understandable for the First Accused, even after disclosure of relevant witness statements, to give relative tactical priority to those related to the **non-stayed** portions of the CI in his investigations and preparations for his defence, as against those related to the “stayed” portions. On the contrary, however, the Moyamba Crime Base Decision would now suggest that testimonies in respect of “stayed” portions are as likely as any others to be presented at any time, even well before some of those related to **non-stayed** portions, and that possibly at so short a notice as to perhaps find the Defence of the First Accused not so well prepared at

time in respect of testimony relating to certain “stayed” portions. Depending on the spate and volume of such testimonies in a certain period, it could inevitably redound to irreparable prejudice to the accused persons, and more especially the First Accused, in the preparation and presentation of their respective defences.

IV. RELIEF SOUGHT.

12. In the circumstances of such a plight for the Defence, and with the likelihood of presentations of “stayed” portion testimonies widening and increasing in spate in the wake of the Moyamba Crime Base Decision, defence preparations would be greatly enhanced and facilitated by the proposed “**stayed**” **witness indexing** as outlined in paragraph 1 above hereof.

13. And such indexing should not be focused only on **geographic locations** or “crime bases” as such. It is submitted that a **trifurcated indexing** along the lines of the Trial Chamber’s tripartite classification of the “stayed” portions of the CI, as set out in para. 38 of the Staying Decision (see paragraph 4 above hereof), would be potentially the most informative and useful format. That is to say, that both all witnesses who have already testified in respect of any “stayed” portions and all those who are yet to testify or likely to do so in respect of “stayed” portions, whether their witness statements have already been or are yet to be disclosed to the Defence, be comprehensively listed and individually index-linked to the respective aspects of the “stayed” portions in the following categories: (a). **new geographic locations**, (b). **extended time-scales or temporal jurisdictions**, and (c). **new substantive elements of charges**. With such detailed and systematic advance indexing of witnesses to their respective aspects of “stayed” portion testimonies, the ever-present risk of imbalance in the equality of arms as between Prosecution and Defence would be quite appreciably redressed in this regard.

V. CONCLUSION

14. In view of the foregoing considerations, representations and submissions, the Trial Chamber is hereby respectfully requested and urged to issue ~~a~~ a “**stayed**” **witness indexing Order** to the Prosecutor along the lines generally canvassed in this Defence Request and in terms broadly similar to those set out in paragraph 1 above hereof.

Done in Freetown 7th March 2005.

DR. BU-BUAKEI JABBI



COURT APPOINTED COUNSEL

Sam Hinga Norman



First Accused