

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge George Gelaga King
Judge Renate Winter
Judge Geoffrey Robertson, QC
Judge A. Raja N. Fernando

Registrar: Mr Robin Vincent

Date filed: 31 January 2005

THE PROSECUTOR

Against

**SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA**

CASE NO. SCSL – 2004 – 14 – T

**PROSECUTION REPLY TO THE DEFENCE RESPONSE TO THE
PROSECUTION NOTICE OF APPEAL AGAINST THE TRIAL CHAMBER'S
DECISION OF 29 NOVEMBER 2004
AND PROSECUTION SUBMISSIONS ON APPEAL**

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I. INTRODUCTION

1. On 29 November 2004, the Trial Chamber gave its interlocutory “Decision on the First Accused’ Motion for Service and Arraignment on the Consolidated Indictment” dated 29 November 2004 (the “**Norman Decision**”).¹ On 12 January 2005, the Prosecution filed an interlocutory appeal against that decision, which included the Prosecution’s submissions on appeal (the “**Prosecution Appeal**”).² On 26 January 2004, the Defence for the First Accused (“**Norman**”) filed a response to the Prosecution Appeal (the “**Defence Response**”).³ Pursuant to paragraph 13 of the Practice Direction for Certain Appeals Before the Special Court dated 30 September 2004 (the “**Practice Direction**”),⁴ the Prosecution files the present reply to the Defence Response.
2. In the Norman Decision, the Trial Chamber made findings with respect to a number of different issues. In brief, the issues dealt with in the Norman Decision, and the Trial Chamber’s rulings thereon, were as follows:
 - a) **Issue 1: Whether Norman had been properly served with the Consolidated Indictment, and if not, whether this situation would unfairly prejudice Norman’s right to a fair trial.**⁵ In relation to this issue, the Trial Chamber found that the Consolidated Indictment had not been properly served on Norman.⁶ However, the Trial Chamber found that this was a procedural error that would not *of itself* unfairly prejudice Norman’s right to a fair trial.⁷

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

² *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T “Prosecution Notice of Appeal Against the Trial Chamber’s Decision of 29 November 2004 and Prosecution Submissions on Appeal”, 12 January 2005 (“**Prosecution’s Appeal**”).

³ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, Norman-“Defence Response to Prosecution Notice of Appeal Against the Trial Chamber’s Decision of 29 November 2004 and Prosecution Submissions on Appeal”, dated 14 January 2004, and filed on behalf of Norman on 26 January 2004 (RP 11605-11617).

⁴ RP 5944-5949.

⁵ See Norman Decision, paras. 3, 5, 8.

⁶ See Norman Decision, paras. 10 – 13.

⁷ See Norman Decision, para. 13.

- b) **Issue 2:** Whether the Consolidated Indictment contained new charges against Norman that were not contained in the Original Norman Indictment.⁸ In relation to this issue, the Trial Chamber found that many of the changes were material to the indictment. Those changes that the Trial Chamber considered to be material to the Indictment are individually listed in paragraph 38 of the Norman Decision.
- c) **Issue 3: Whether the Rules required Norman to be rearraigned on the Consolidated Indictment.** In respect of this issue, the Trial Chamber found that in the Rules and practice of the International Tribunals, a consolidated or amended indictment need not be confirmed by a Trial Chamber or judge if:
- i) the initial indictments that were subject to joinder were already confirmed, and
 - ii) the charges in the amended indictment are essentially the same or similar to the original ones.⁹

It follows from the Trial Chamber's reasoning (and particularly from its reference to *R v. Fyffe* in paragraph 31 of the Norman Decision) that if (contrary to the Trial Chamber's finding in respect of Issue 2 above) the Consolidated Indictment in this case contains no impermissible changes from the Original Norman Indictment, there is no need for Norman to be rearraigned on the Consolidated Indictment.

- d) **Issue 4: Whether the Original Norman Indictment needed to be formally quashed or withdrawn.** The Trial Chamber held that it did not.¹⁰
3. In the present appeal, the Prosecution's primary challenge is to the Trial Chamber's findings in relation to Issue 2. For the reasons given in the Prosecution Appeal, and for the reasons given below, the Prosecution submits:
- a) that none of the differences in language between the Original Norman Indictment and the Consolidated Indictment referred to in paragraph 38 of the Norman Decision constitute new or additional charges, or new factual allegations in support of any of the counts in the indictment; and

⁸ See Norman Decision, para. 15; ("the Trial Chamber considers it necessary to assess whether or not the charges outlined in the Consolidated Indictment, are materially different from the charges listed in the Initial Indictment which was served on Norman and would therefore constitute *new charges* as contemplated by Rule 50 of the Rules" (emphasis added)); para. 16 ("... the Trial Chamber will consider whether there are any *new charges* to the Consolidated Indictment by comparison to the Initial Indictment" (emphasis added)).

⁹ See Norman Decision, paras. 3, 6, 31.

¹⁰ See Norman Decision, paras. 4, 7, 33-37, especially para. 37.

- b) that there has been no demonstrated prejudice to Norman, nor has any particular potential prejudice been identified.
4. The Prosecution does not, as such, seek to challenge directly the Trial Chamber's reasoning in respect of Issue 1 or Issue 3, but submits that the Trial Chamber's reasoning will lead to a different result if the Appeals Chamber reverses the Trial Chamber's ruling in respect of Issue 2. The Prosecution submits that if the Trial Chamber's ruling in respect of Issue 2 is reversed, it follows from the Trial Chamber's own reasoning in respect of Issue 1 and Issue 3 that:
- a) there were no particular circumstances in the present case which caused the lack of proper service to unfairly prejudice Norman's right to a fair trial, and
 - b) there is no need for Norman to be rearraigned on the Consolidated Indictment.
5. Nor does the Prosecution appeal against the ruling of the Trial Chamber in respect of Issue 4. Accordingly, the appeal in this case is directed to the Trial Chamber's ruling in respect of Issue 2.
6. Following the Norman Decision, the Prosecution also filed, before the Trial Chamber, a motion to amend the Consolidated Indictment.¹¹ The filing of that motion before the Trial Chamber in no way signals that the Prosecution concedes that the Norman Decision is correct in ruling that the changes in the Consolidated Indictment require a formal amendment to the Consolidated Indictment.

II. PART II.A (paragraphs 5-13) of the Defence Response

7. Paragraphs 5-13 of the Defence Response contain certain general submissions of the Defence relating to the Prosecution Appeal as a whole.
8. In **paragraph 6** the Defence Response argues that Norman did in fact raise a "serious oral objection" to the Consolidated Indictment on 14 June 2004. Norman made an opening statement on the 15 June 2004. It was not for the Trial Chamber to take any action in response to this oral statement by Norman. The onus was on Norman to present a formal motion. The accused did not do so until the 21 September 2004, over three months later.

¹¹ Prosecutor v. Norman, Fofana and Kondewa, Case No. SCSL-2004-14-T, Norman – "Request for Leave to Amend the Indictment Against Norman," 8 December 2004.

9. **Paragraph 7** of the Defence Response complains that paragraphs 11-17 of the Prosecution Appeal state that the Norman Motion raised “two objections”. According to the Defence Response, these paragraphs of the Prosecution Appeal fail to mention the “non-arraignment objection” that was also raised in the Norman Motion (that is, the objection giving rise to the issue referred to as Issue 3 above. The Prosecution does not understand the nature of this complaint in the Defence response. If Norman’s Issue 2 objection is not upheld, there can be no basis for his Issue 3 objection.¹² That is why the Prosecution Appeal treats the Issue 3 objection as a *consequence* of the Issue 2 objection, rather than as a separate and independent objection.
10. **Paragraph 8** of the Defence Response complains that the Prosecution Appeal does not expressly mention the Trial Chamber’s finding that the failure to effect personal service was contrary to Rule 52 of the Rules and an order of the Trial Chamber. The Prosecution does not understand the nature of this complaint.
11. **Paragraph 9** of the Defence Response appears to do no more than observe that the Prosecution’s primary challenge is to the Trial Chamber’s findings in relation to Issue 2 of the four issues referred to above. That is correct.
12. **Paragraph 10** of the Defence Response appears to suggest that the Prosecution is not appealing against the Trial Chamber’s “suggestion” that the Prosecution seek the leave of the Trial Chamber to amend the Consolidated Indictment, since the Prosecution has filed a motion before the Trial Chamber seeking leave to amend the Consolidated Indictment. That is not correct, as explained in paragraph 6 above.
13. **Paragraphs 11 and 12** of the Defence Response appear to argue that the Trial Chamber never found that the changes made in the Consolidated Indictment constitute “new or additional charges” or “additional criminal liability”, but that the Trial Chamber merely found that these changes were “material”. However, the Trial Chamber ultimately concluded that the Consolidated Indictment “contains new factual allegations adduced in support of existing confirmed counts, and substantive elements of charges, that are material to the case against Norman”.¹³ The Prosecution submits that the clear import of these words is that the Trial Chamber’s conclusion was that the Consolidated Indictment alleges additional criminal liability on the part of Norman, by specifying additional criminal acts for which Norman is

¹² That is why the Prosecution in this appeal does not directly seek to seek to challenge the Trial Chamber’s ruling in the Norman Decision on the “non-arraignment objection” (see paragraph 6 above).

¹³ Norman Decision, para. 38.

alleged to be liable, and that the Consolidated Indictment therefore contains “new charges”. It is this conclusion of the Trial Chamber that the Prosecution challenges in this appeal.

14. If the Prosecution understands **paragraph 13** of the Defence Response correctly, it argues that the Appeals Chamber has no power to decide that the Norman Motion must be rejected, since only the Trial Chamber has the power to decide this. The Prosecution submits that this is not the case. Article 20(2) of the Statute of the Special Court provides expressly that the Appeals Chamber may “affirm, reverse or *revise* the decisions taken by the Trial Chamber” (emphasis added). In this case, it would cause unnecessary delay for the Appeals Chamber to overturn the Trial Chamber’s decision and to remit the matter to the Trial Chamber for further consideration.
15. The Prosecution submits, in summary, that the Appeals Chamber has the power in this appeal to substitute its own decision for that of the Trial Chamber.

III. PART II.B (paragraphs 14-27) of the Defence Response

16. **Paragraphs 14 and 15** of the Defence Response appear to say no more than that the “grand and ultimate design” of the Prosecution Appeal is to show that the changes made to the Consolidated Indictment are not material, but are either mere differences of expression, or changes which state the allegations with greater particularity. That is essentially correct.
17. **Paragraphs 16-18** of the Defence Response deals with the Prosecution argument that various paragraphs of the Consolidated Indictment are worded with greater particularity than the Original Norman Indictment, by virtue of the omission of the words “but not limited to” that were contained in the Original Norman Indictment, and by the inclusion instead of a number of additional specific locations.
18. The Defence Response thereby assumes that in the Original Norman Indictment, the general formulation “but not limited to” was an expression that encompassed only locations in the same geographic districts of Sierra Leone as the locations specifically mentioned in the Original Norman Indictment. The Prosecution submits that this assumption is unfounded. There is nothing in the Original Norman Indictment to suggest that the crimes for which Norman is alleged to be responsible were confined to specific geographic districts of Sierra Leone. The Original Norman Indictment alleged that the crimes were “committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone” (paragraph 9), and that the plan, purpose or design of Norman:

“was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone” (paragraph 15).

19. The inference is that the crimes for which Norman is alleged to be responsible occurred throughout the territory of Sierra Leone.
20. **Paragraph 19** of the Defence Response takes issue with the Prosecution’s argument that the extortion of money from civilians is a particular form or example of looting of private property (see Prosecution Appeal, para. 36). However, the Defence Response does not explain why the extortion of money from civilians is *not* a form of looting of private property. The Prosecution submits that it is.
21. **Paragraph 20** of the Defence Response deals with the Prosecution argument that the allegation in paragraph 29 of the Consolidated Indictment, and Count 8 of the Consolidated Indictment, are *narrower* than the corresponding provisions of the Original Norman Indictment (see Prosecution Appeal, paras. 66-71). The Defence Response argues that the *narrowing* of a charge is a material change to the Indictment. The Prosecution submits that even if it is, it is clearly a change that is solely to the benefit of Norman, and it is impossible to see how Norman could be prejudiced by such a change. If the Appeals Chamber were to decide that the Prosecution is not able to *narrow* a charge without formally seeking to amend the Consolidated Indictment, the Prosecution is content to allow the broader charge to stand.
22. **Paragraph 21** of the Defence Response argues that although some of the changes in the Consolidated Indictment may not constitute the addition of any new charge or new criminal liability, these changes are nonetheless *material* for the charges in question, in that they “are in themselves new elements of charges and/or new offences, if not expressly new charges as such”. The Prosecution does not understand this argument. If the changes were “in themselves new elements of charges and/or new offences”, then the changes would constitute the addition of new charges or new criminal liability. The focus of the Trial Chamber’s enquiry was whether the amendments made in the Consolidated Indictment constituted “new charges”. That, in the Prosecution’s submission, is the crucial issue in this appeal. For the reasons given in the Prosecution Appeal, the Prosecution submits that the changes in the Consolidated Indictment constitute neither the addition of any new charge, nor any new criminal liability, *nor* new elements of charges, *nor* new offences.
23. **Paragraph 22** of the Defence Response states that the Prosecution Appeal appears to consider that the additional timeframes for some of the crimes in the Consolidated Indictment were previously included within the general expression “but not limited to” in the Original

Norman Indictment. That is a correct understanding of the Prosecution position (see paragraph 53, 59 and 64 of the Prosecution Appeal).

24. **Paragraphs 23-26** of the Defence Response deal with the rewording of the expression “Kamajors” in the Original Norman Indictment into “the CDF, largely Kamajors” in the Consolidated Indictment. Contrary to what the Defence Response suggests, the Prosecution does not contend that this is a “mere change in wording” and nothing more.¹⁴ The Prosecution Appeal concedes that the two expressions have a slightly different meaning.¹⁵ The Prosecution position is that this change does not constitute the addition of a new charge in the indictment, or an expansion of the scope of the charges against Norman,¹⁶ but rather, that it is a slight correction to the particulars of the identity of the individuals for whose acts Norman is alleged to have been criminally responsible.¹⁷ The Prosecution position is that in all of the particular circumstances of this case, it was permissible for the Prosecution to make this correction to the particulars when preparing the Consolidated Indictment (see paragraphs 79-88 of the Prosecution Appeal), and given especially that there has been no demonstrated prejudice to Norman (see paragraphs 89-91 of the Prosecution Appeal).
25. **Paragraph 27** of the Defence Response essentially repeats the same Defence argument made in paragraph 21 of the Defence Response, which is dealt with above.
26. **Paragraph 28** of the Defence Response argues that the Prosecution has conceded, in paragraph 83 of the Prosecution Appeal, that the Consolidated Indictment “amends” the Original Norman Indictment in several crucial respects. What the Prosecution in fact acknowledges is that in the Consolidated Indictment, there have been certain amendments *to the wording* of the Original Norman Indictment. In this paragraph, the Defence Response appears to be suggesting that where a consolidated indictment contains any amendment from the wording of the original indictments it incorporates, it constitutes an “amended indictment”, that is therefore required to go through the indictment amendment procedures in Rule 50 of the Rules.
27. The Prosecution submits that this is not the case. The Prosecution prepared and filed the Consolidated Indictment in this case because the Trial Chamber had *ordered* the Prosecution

¹⁴See Defence Response, para. 26.

¹⁵ Prosecution Appeal, para, 75.

¹⁶ Prosecution Appeal, para. 77.

¹⁷ Prosecution Appeal, para. 77.

to prepare a consolidated indictment.¹⁸ The Prosecution submits that it is obvious that an indictment that is a consolidation of three previously separate indictments cannot be identically worded to any of the original three. It is inevitable that the consolidated indictment will contain certain changes in the language from the original indictments. In ordering the Prosecution to prepare a consolidated indictment, the Trial Chamber had therefore by necessary implication given the Prosecution leave to make certain amendments to the wording of the original indictments, to the extent that this was necessary to produce a consolidated indictment.

28. It was acknowledged in the Prosecution Appeal that there are limits to the discretion of the Prosecutor to make such amendments in preparing a consolidated indictment.¹⁹ The issue before the Trial Chamber was whether the changes made in the Consolidated Indictment in so far as they relate to Norman exceeded this discretion of the Prosecution. The issue in this appeal is whether the Trial Chamber erred in deciding that the Prosecution *had* exceeded that discretion. For the reasons given in the Prosecution Appeal, it is submitted that the Trial Chamber did err in so deciding, and that the Prosecution had *not* exceeded this discretion.
29. The Prosecution does not understand **paragraph 29** of the Defence Response. The Defence Response appears to suggest that the Prosecution erroneously relied on Rule 48(A) as the basis for its joinder motion, rather than on Rule 48(B). However, any such argument has nothing to do with the issues in this appeal. The Defence Response also appears to suggest that there is something improper about the Prosecution appealing against certain aspects of the Trial Chamber's decision only, while seeking to rely on other aspects of the Trial Chamber's decision which are the subject of a separate appeal by the Defence. The Prosecution submits that there is nothing improper, or indeed even unusual, about such a situation.
30. **Paragraphs 30-33** of the Defence Response appear to deal with arguments relevant to Norman's appeal against the Norman Decision. The Prosecution has responded to the Norman's Appeal in a separate document. The Prosecution submits that it is inappropriate for the Defence, in a response to a Prosecution appeal, to deal with matters relevant to a separate Defence appeal.

¹⁸ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2003-08-PT, "Decision and Order on Prosecution Motions for Joinder," 27 January 2004 (RP 6547-6569) (the "*Joinder Decision*").

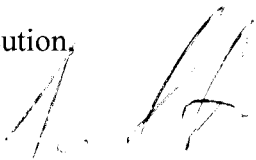
¹⁹ Prosecution Appeal, paras. 80-81.

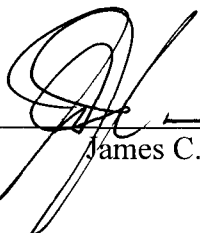
CONCLUSION

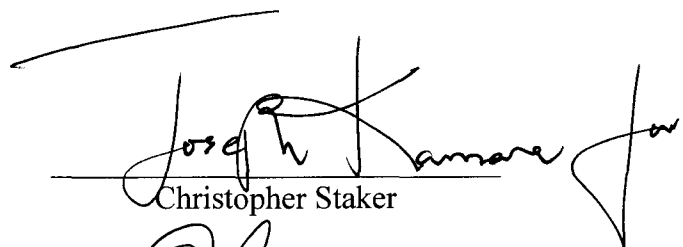
31. The Prosecution requests the Appeals Chamber reverse the Norman Decision to the extent that it allowed the Norman Motion, and to hold that the Norman Motion is rejected in its entirety. Specifically as identified in Issue 2 (paragraph 2 (b) above), the Prosecution submits that the Consolidated Indictment contains no new charges against Norman that were not contained in the original Norman Indictment.

Freetown, 31 January 2005.

For the Prosecution,



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Kevin Taverner

PROSECUTION'S INDEX OF AUTHORITIES

1. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment,” 29 November 2004.
2. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T “Prosecution Notice of Appeal Against the Trial Chamber’s Decision of 29 November 2004 and Prosecution Submissions on Appeal”, 12 January 2005.
3. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, Norman- “Defence Response to Prosecution Notice of Appeal Against the Trial Chamber’s Decision of 29 November 2004 and Prosecution Submissions on Appeal”, dated 14 January 2004, and filed on behalf of Norman on 26 January 2004.
4. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, Norman – “Request for Leave to Amend the Indictment Against Norman,” 8 December 2004.
5. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2003-08-PT, “Decision and Order on Prosecution Motions for Joinder,” 27 January 2004.