

SCSL - 2004 - 15 - PT
(343 - 351)
SPECIAL COURT FOR SIERRA LEONE

CASE No. SCSL - 2004 - 16 - PT

Before: Judge Bankole Thompson
Judge Benjamin Itoe
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: February 19th 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY

DEFENCE RESPONSE TO PROSECUTION'S
APPLICATION TO AMEND THE INDICTMENT

OFFICE OF THE PROSECUTOR

Mr. Luc Côté
Mr. Robert Petit
Mr. Christopher Santora

DEFENCE

Mr Tim Clayson
Mr Wayne Jordash
Mr Serry Kamal
Ms Sareta Asraph

SPECIAL COURT FOR SIERRA LEONE	
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INTRODUCTION

1. On the 9th February 2004 the Prosecution filed a request for Leave to Amend the Indictment (the “Request”) against Issa Hassan Sesay, Morris Kallon and Augustine Gbao, pursuant to Rules 50(A) and 73(A) of the Rules of Procedure and Evidence for the Special Court (“the Rules”). The defence herewith submits its opposition to the Request (the “Response”).
2. The Prosecution details its proposed amendments in paragraph 5A – I. The Response herein sets out the opposition to the proposed amendments contained within paragraph A – G of the Request. As regards the amendments detailed in sub – paragraphs H and I (the “modification of the time periods in paragraph 23” and the addition of “alternative spellings”) the defence do not oppose the request.

SUBMISSIONS – the legal basis

3. The defence agrees with the Prosecution submissions contained within paragraphs 6 – 8 of their Response. In particular the defence submit:
 - (i) That the burden is on the Prosecution to demonstrate sufficient legal and factual grounds for the amendment.¹
 - (ii) That the decision to grant a request to amend the indictment is discretionary and must be made in light of the overall interests of justice² having particular regard to the specific circumstances of the case and the accused’s right to an expeditious trial.³
 - (iii) That in deciding whether the Prosecution’s request would prejudice fundamental rights of the Accused, the Court must establish (a) whether the Prosecutor acted with undue delay in submitting the request and (b) whether the amendments, if approved, will cause undue delay to the trial of the Accused.⁴
4. The defence also respectfully submit that the Trial Chamber, in the exercise of its discretion, ought to take account of the following;

¹ See for example Prosecutor v Gratién Kabiligi & Aloys Ntabakuze, ICTR – 97 – 34 – I and ICTR – 97 – 30 – I, Decision on the Prosecutor’s Motion to Amend the Indictment”, 8 October 1999, para. 42.

² Ibid para 43.

³ Prosecutor v Bizimungu, Mugenzi, Bicamumpaka & Muriraneza, ICTR – 99 – 50 – I, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 6 October 2003, para. 27.

⁴ See Request para. 13

- (i) Rule 47 of the Rules insofar as the Prosecution request includes a proposed new charge.⁵ It is submitted that this proposed amendment must satisfy the provisions of Rule 47 and the rights of the accused contained therein must be applicable.⁶ In other words before an amendment is allowed the “inquiry governed by Rule 47, applicable to all indictments submitted and a prima facie case must be presented”.⁷
- (ii) The effect that the amended indictment would have on the overall proceedings.⁸ In this regard it is noteworthy that Rule 72 is applicable to amendments made pursuant to Rule 50. It is submitted that the right of the accused to file preliminary motions relating to the new charge and the consequences in terms of potential delay and additional litigation ought, in the unique circumstances of the Special Court, to weigh heavily in the Trial Chambers consideration of the interests of justice.
- (iii) That the right of an accused to be informed promptly of the nature and cause of the charges against him enshrined in similar terms in Article 6(3) of the European Convention on Human Rights (ECHR), Article 14(3) (a) of the International Covenant on Civil and Political Rights (ICCPR) and Article 21 of the Statute of the Special Court, constitutes one element of the general requirement of fairness that is a fundamental aspect of a fair trial. This “right must be assessed firstly in light of the general requirement of fairness to the accused; secondly, that the information provided to the accused must enable him to prepare an effective defence; thirdly that the accused must be tried without undue delay; and fourthly that the requirement must be interpreted according to the special features of each case.”⁹

⁵ See para 4 of the Request

⁶ See for example Conclusion section of Prosecutor v Kovacevic, IT – 97- 24- AR73, Decision stating reasons for Appeals Chamber order of 29 May and ICTR – 99 – 50 – AR50; para. 5 of Prosecutor v Bizimungu et al, ICTR – 99 – 50 – AR50; the individual opinion of Judge Pocar in the Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6th October 2003 Denying Leave to File Amended Indictment.

⁷ Ibid para 5

⁸ Prosecutor v Karemera e al; para. 15 of the Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 8th October 2003 Denying Leave to File Amended Indictment.

⁹ Prosecutor v Kovacevic, IT – 97- 24- AR73, Decision stating reasons for Appeals Chamber order of 29 May.

- (iv) That there is a need for caution against placing significant weight on factors relied upon by the Prosecution in support of their Request which are invoked without elaboration.¹⁰ In this regard the defence would highlight the generalizations contained within the Request at para 12 (“serve the interests of justice”) para 27 (“the importance of the evidence to the proceedings as a whole”) and para 29 (“The amended indictment gives fuller effect to the mandate as provided in the Statute of the Special Court...”) and
- (v) That the “risk of prejudice from (charge) expansions is high and must be carefully weighed”.¹¹

PROPOSED NEW CHARGE

Undue delay in making the Request

5. The defence submits that the Prosecution submissions in this regard are contradictory. On the one hand it seeks to submit the allegations which support the proposed new charges are contained within the evidence already disclosed and yet seeks to assert that their request is timely. Putting aside the fact that the Prosecution have given no indication to either the defence or the Trial Chamber as to when the specific evidence was disclosed, it is submitted that the time to make the Request was at the time of (or shortly thereafter) the disclosure of this evidence.

¹⁰ See para. 16 of Prosecutor v Karemera et al; para. 15 of the Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 8th October 2003 Denying Leave to File Amended Indictment (the Prosecution having urged that the Trial Chamber erred by failing to consider the rights of victims, the mandate of the International Tribunal to adjudicate serious violations of international humanitarian law and the Prosecutors responsibility to prosecute suspected criminals and to present all relevant evidence before the International Tribunal. The Appeals Chamber noted when refusing the appeal that it was “hesitant to ascribe too much weight to these factors, at least when they are presented at such a level of generality. The mandate of the International Tribunal, the rights of the victims and the obligations of its Prosecutor are present in every case, and mere reference to them without further elaboration does not advance the analysis”) and ; para. 13 of Prosecutor v Bizimungu et al, ICTR – 99 – 50 – AR50; the individual opinion of Judge Pocar in the Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6th October 2003 Denying Leave to File Amended Indictment.

¹¹ ; para. 19 of Prosecutor v Bizimungu et al, ICTR – 99 – 50 – AR50; Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6th October 2003 Denying Leave to File Amended Indictment.

6. The Prosecution submission contained in paragraph 16 of their Request; that the Request has been made “well in advance of trial” fails to take into account the unique circumstances of the Special Court. In particular the Prosecution have chosen to ignore the limited mandate of the Special Court (as regards both the time period to complete its work and the financial constraints placed upon it). In addition the Prosecution have failed to appreciate (i) that the trial of Mr Sesay is at most only 3 months hence (ii) that the period for investigating his (and other accused’s) defence is similarly restricted (as compared to the Prosecution who have been investigating for over one year (iii) that the number of investigators provided for in the defence budget is only one (compared to the Prosecution who have at the very least fifteen).
7. The issue of timeliness and the addition of a new charge can not be adjudicated upon without a proper consideration of these factors and the consequential difficulties the defence face to be prepared for trial on the present indictment.
8. Furthermore the defence note the concession made by the Prosecution in paragraph 17 of their Request that they could have filed their Request earlier than the 9th February 2004. The Prosecution’s assertions therein that their decision to delay was, at least in part, to “avoid filing separate motions for each accused” lacks credibility since the Prosecution have previously argued that the indictments against the accused from the RUF and AFRC were practically the same¹² thereby requiring little duplication of work. At the very least their approach therefore appears to ignore the fact that, by its own admission, the Prosecution have failed to disclose the new charges promptly upon the accused’s arrest¹³ and appears moreover to place considerations of Prosecution convenience above the need to comply with their obligations pursuant to Article 21 of the Statute and the right of the accused to be tried without undue delay.

¹² See the Prosecution’s motion for joinder of the accused alleged to be members of the RUF and the AFRC dated the 9th October 2003

¹³ See Prosecutor v Kovacevic; IT -97- 24 - A

Amendment will unduly delay the Trial

9. The Prosecution appear to seek to have this issue adjudicated upon in a vacuum. Their assertion in paragraph 21 of the Request that the new proposed charge does not place any undue burden on the defence in the preparation of our case (due to the fact that the amendment is based on existing allegations) fails to acknowledge the multiplicity of issues, both legal and factual, which arise from the Proposed amendment; for example those issues which arise pursuant to Rule 72 and the need for further defence investigations to counter the allegations.

10. In particular the defence note the submissions in paragraph's 2 – 12 of the Defence Response (dated the 17th February 2004) to the Request made on behalf of the accused Mr Kanu. The defence adopts all the submissions contained within those paragraphs. In short if the amendment is allowed, at the very least, Rule 50 and Rule 72 will become engaged giving rise to prolonged litigation which, by its very nature, will both delay the trial and place new burdens upon the defence and the Special Court.

11. It is further submitted that it is plain from the vary fact that the amendment will give rise to fresh litigation that the Prosecution submissions contained in paragraph 23 of their Request and in particular their reliance on the Karemera¹⁴ (the simplification of proceedings) are misplaced. In the overall context of the case the multiplication of issues at this stage is both untimely and against the interests of justice.

¹⁴ See para. 15 of Prosecutor v Karemera e al; para. 15 of the Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 8th October 2003 Denying Leave to File Amended Indictment

Modification of the date to “Between “about” 1 June 1997 and 30 June 1997

12. The defence submit that this proposed amendment unacceptably widens the scope of the indictment and ought to be resisted as (i) lacking in specificity and (ii) placing, at a late stage, an additional burden upon the defence. The defence submit that the inclusion of this word takes this aspect of the indictment from the specific to the general thus creating the type of potential for ambiguity which has previously been ruled unacceptable by the Trial Chamber.¹⁵

Modification of the time period in paragraph 17

13. The defence submit that the proposed amendment to widen, by one and a half years, the period of alleged liability is untimely and unfair. The defence refers the Trial Chamber to paragraphs 6, 8 & 9 of this Response and repeats its submissions therein.

14. Moreover the defence note the concession made by the Prosecution that their proposed amendment would create a liability “far outside the time limit set out in paragraph 71”. In light of this fair concession the defence would therefore submit that substantial amendments such as this ought not to be made without requiring a great deal of proof by the Prosecution that it would be in the interests of justice. It is submitted that the generalized justifications contained within paragraph 5G (“revealed by investigations done since the confirmation and the continual analysis of the evidence”) does little to discharge the burden upon the Prosecution to satisfy the Trial Chamber that the Request is either timely or would not prejudice the accused in the preparation of his defence.

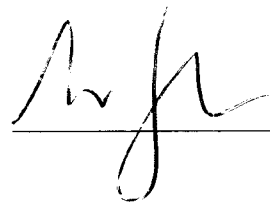
¹⁵ see para. 33 of the Decision in the case of Sesay on the defence Preliminary Motion for defects in the form of the indictment, dated 13th October 2003 in which the Trial Chamber referred to “pleading by ambush”.

CONCLUSION

- 15. In these circumstances and upon a consideration of the overall interests of justice the defence submits the amendments as aforementioned ought to be refused as against the interests of justice in the circumstances of this case.

Respectfully submitted
Done on the 19th February 2004

Mr. Tim Clayson
Mr. Wayne Jordash
Mr. Serry Kamal
Ms Sareta Asraph



BOOK OF AUTHORITIES

1. Prosecutor v Gratién Kabiligi & Aloys Ntabakuze, ICTR – 97 – 34 – I and ICTR – 97 – 30 – I, Decision on the Prosecutor’s Motion to Amend the Indictment”, 8 October 1999, para. 42.
2. Prosecutor v Bizimungu, Mugenzi, Bicamumpaka & Muriraneza, ICTR – 99 – 50 – I, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 6 October 2003, para. 27.
3. Prosecutor v Kovacevic, IT – 97- 24- AR73, Decision stating reasons for Appeals Chamber order of 29 May and ICTR – 99 – 50 – AR50.
4. Prosecutor v Bizimungu et al, ICTR – 99 – 50 – AR50; the individual opinion of Judge Pocar in the Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6th October 2003 Denying Leave to File Amended Indictment.
5. Prosecutor v Karemera e al; para. 15 of the Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 8th October 2003 Denying Leave to File Amended Indictment.
6. Prosecutor v Kovacevic, IT – 97- 24- AR73, Decision stating reasons for Appeals Chamber order of 29 May.
7. Prosecutor v Bizimungu et al, ICTR – 99 – 50 – AR50; Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6th October 2003 Denying Leave to File Amended Indictment.
8. International Covenant on Civil and Political Rights
9. The European Convention on Human Rights and its five protocols.