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SCSL-2004-14-PT  
(383-392)

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**SPECIAL COURT FOR  
SIERRA LEONE**

**Case No. SCSL – 2004-14-PT**

**Before: Judge Bankole Thompson  
Judge Benjamin Itoe  
Judge Pierre Boutet**

**Registrar: Mr. Robin Vincent**

**Date Filed: 19<sup>th</sup> February 2004**

**THE PROSECUTOR**

**Against**

**ALIEU KONDEWA**

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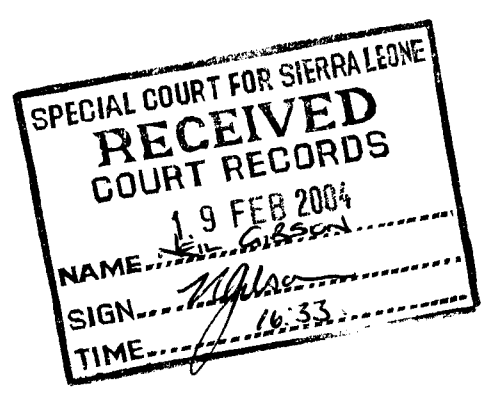
**DEFENCE RESPONSE TO PROSECUTION’S REQUEST FOR LEAVE TO  
AMEND THE INDICTMENT**

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**Office of the Prosecutor  
Luc Cote  
James Johnson**

**Defence Counsel  
Charles Margai  
Yada Hashim Williams  
Ansu Boyce Lansana**

**Defence Office  
Sylvain Roy  
Rupert Skilbeck  
Ibrahim Sorie Yillah**



## I INTRODUCTION

1. Pursuant to the Prosecution's "Request for Leave to Amend the Indictment" dated the 9<sup>th</sup> February 2004 (Request), the Defence of Mr. Alieu Kondewa herewith files its "Defence Response to the Request for Leave to Amend the Indictment".
2. The Prosecution seeks by way of the Request the addition of four new charges which are in substance offences of sexual nature. These offences include rape, a crime against humanity, sexual slavery and any form of sexual violence, other inhumane acts and outrages upon human dignity. The proposed amendments also seek to extend the time frames contained in paragraphs 25.d, 26.a and 27 of the Indictment {paras. 26.d, 27.a and 28 of the Amended Indictment}, and adds new locations, Bo Town and Mabang to Paragraph 26.a {para. 27. a of the Amended Indictment}. The Prosecution also seeks to add new paragraphs 24 and 31 reflecting the proposed amendments.
3. The Prosecution argued that the proposed amendments should be granted as it is justified both in law and fact for the following reasons; that the proposed amendments incorporates new evidence which was not available at the time of submitting the current indictments and that there has been no undue delay in bringing the amendments and further that the filing of the proposed amendments will not prejudice the rights of the Accused.
4. The Prosecution also argued that the decision to grant an amendment is discretionary and must be considered in the overall interests of justice taking into account the circumstances of the case and also whether there has been undue delay in submitting the motion and also whether the proposed amendments seek to unduly delay the trial of the accused.
5. The Prosecution submitted that the filing is timely having regard to the complexity of the case and the challenges related to investigation of such crimes. In this regard, the Prosecution submitted that it had been difficult to

obtain new evidence as a result of the fears expressed by potential witnesses and for reasons associated with judicial economy.

6. The Prosecution also submitted that the amendments would not unduly delay trials as the proceedings are currently at pre-trial stage. They also argued that they have an obligation to defend to the full extent of the law and that no serious prejudice would result having regard to the timeliness of filing and the stage at which the proceedings are at present.

## LEGAL BASIS

1. The Prosecution prays in aid Rule 50 (A) of the Rules of Procedure and Evidence of the Special Court for Sierral Leone (Rules) which is similar to Rule 50 (A) of the ICTR and ICTY. This Rule has been given varying interpretations by the ICTY and ICTR<sup>1</sup>.

## ARGUMENTS

1. The Defence for Alieu Kondewa submits that the Request should be dismissed in its entirety for the following reasons:
  - a) The Prosecution has not made a showing that the proposed amendments will not prejudice the rights of the Accused<sup>2</sup> and the Defence submits that the relevant factors to be taken into account are the following:
  - b) Was the Prosecution diligent in bringing the motion at this point in time<sup>3</sup>?  
The factual background materials submitted by the Prosecution indicate

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See ICTR Appeals Chamber decision in Bizimungu et al dated the 12<sup>th</sup> February 2004. See also decision dated the 21 May 1998 in the Prosecutor v Kordic and Cerkez

The trend of jurisprudence culminating in the Appeals Chamber decision in Bizimungu et al dated the 12<sup>th</sup> February 2004 is to scrutinize the requests for amendments and determine whether they enhance the rights of the Accused in the overall interests of justice. The Appeals Chamber upheld the Trial Chamber's decision rejecting the Prosecutor's request to amend.

<sup>3</sup> In the Prosecutor v Simba, the Trial Chamber noted the factors to be weighed in granting or refusing amendments and placed heavy weight on the due diligence and professionalism of the Prosecution. Decision dated the 26<sup>th</sup> day of January 2004.

that it had commenced investigations a year ago before indicting the Accused in June of 2003. This in effect means that the Prosecution had been investigating the Accused two years before bringing the motion in a country where its offices and that of the Court are situated and has unrestricted access to investigations. The Defence submits that prudent investigators should have brought such charges long ago as they had ample time to have done so.

- c) The Defence submits that reference to the other indictments filed as early as March of 2003 had preferred charges of sexual nature against other accused persons falling within the categories of AFRC and RUF (See indictments filed against *Issa Hassan Sesay*, *Brima Bazzy Kamara* etc). Why only bring such charges at this point in time when *the loci* of alleged commission of these crimes are the same within a small country. Furthermore the Accused in this case is in a peculiar position speaking only one language *mende*, and for which the Trial Chamber had granted orders in the past to interpret the proceedings that have been conducted regarding him and for which his defence team always needs special interpreters to be interpreting the disclosures materials served on him by the Prosecution. The case preparation in respect of the Accused is particularly difficult for the referred reason and bringing new charges would involve serving fresh disclosure documents which would again warrant a re-commencement of the case preparation process *de nouveau*.
- d) The Defence further reiterates the argument that the fact that the Accused speaks only *mende* and not even *Krio*, the *lingua franca* in Sierra Leone makes the case preparation process of the Accused more difficult. The addition of fresh charges would also firstly involve interpreting the documents and the charges, and determining by interpretation the defence to be put forward in addition to the various jurisdictional questions that may be raised by the Defence on account of the new charges brought<sup>4</sup>. The

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Ibid fn 1 above, The Appeals Chamber considered this issue in the Bizimungu case and considered the potential delay this would have caused on the detention of the Accused

Defence therefore submits that for the reasons canvassed, the motion is highly prejudicial to the Accused and will violate his rights to a fair trial and effective and adequate case preparation guaranteed by Article 17 of the Statute of the Court.

- e) Furthermore, the Defence submits that the proposed amendments would infringe fair trial guarantees granted the Accused by the Statute of the Court<sup>5</sup>. The right to effective case preparation juxtaposed with the Prosecutor's obligations to prosecute to the full extent of the law should take account of the stage at which the case for the Defence has proceeded. Though the Defence concedes that the proceedings are at a pre-trial stage, the Trial Chamber is enjoined to take account of the fact that dates have been scheduled for the hosting of status conference on the 4<sup>th</sup> March 2004 in respect of the Accused. This conference is with a view to eventually pave the way for dates for trials amongst other things to be agreed upon. The bringing of new charges will disrupt the case for the defence and the Prosecution ought to have considered the effects of such amendments on the defence case strategy. The Defence has already positioned its investigations to address certain defence issues within certain time frames and in some geographical locations. The effect of the new charges would be to alter these strategies and would require a re-think and re-strategising the whole case for the accused coupled with practical problems associated with interpreting the documents that will be served on the Accused. The Defence team has an obligation to interpret all documents and every step of the proceedings on the Accused and this would be triggered on account of the new charges.
- f) The Defence submits further the extent of the amendments sought would affect the case preparation of the Accused which is a thorough enterprise in itself. They consist of expansions by way of expanding the basis of liability of the Accused and including in this regard four new charges, and expanding as well the time frame and stating other different locations

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<sup>5</sup> See the Prosecutor v Kovacevic (Appeals Chamber) dated the dated the 29<sup>th</sup> May 1998

where the alleged offences have been committed. This situation would invariably expand the work scope of the defence and would necessitate a re-think of case strategy as well as preparation.

- g) The Defence further submits that the expansions made by the Prosecution in support of the new counts do amount to substantial changes which would cause prejudice to the Accused<sup>6</sup>. The new charges do not only levy new allegations against the Accused but also expand on the timeframe and places within which the defence investigative team has to work and carry out its mandate.
- h) The Defence further submits that the complexity of the case and the challenges posed to its investigations should be counterbalanced with the rights of the Accused to a fair trial. The Appeals Chamber in the *Prosecutor v Casimir Bizimungu et al*<sup>7</sup>, considered this question and stressed that such a factor has to be counterbalanced with the rights of the Accused. The Defence would go a step to submit that the integrity of the process should also be another factor to be taken into account in exercising discretion as to whether or not to grant the amendments sought.
- i) The Defence further invites the Chamber to look closely at the proposed amendments and determine the extent to which the proposed changes would necessitate that the Accused be given more time to prepare his defence resulting in the prolongation of his pre-trial detention on account of the new charges. The Accused would ask for more time to examine the offences preferred, whether or not the form of the new charges should be contested and possibly the raising of threshold questions of jurisdiction that may arise as a result of the preferment of new charges.
- j) The Defence further submits that the Prosecution had not given prior notice of its intentions to seek leave to amend the current indictment and that these amendments if granted would place the Prosecution in an advantageous position over the defence team as far as the case preparation

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<sup>6</sup> Prosecutor v Brdanin and Talic dated the 26<sup>th</sup> June 2001 where this issue was considered

<sup>7</sup> Ibid fn 1 above

and fair trial issues are concerned. The Defence invites the Chamber to look closely at the circumstances under which the proposed amendments are sought and draw a conclusion that the timing would place the Prosecution at a tactical advantage over the defence. The Prosecution conceded that it timed the application to take into account the joinder decision and the fact that the proceedings were still at a pre-trial stage. The Prosecution did not however consider the effect on the pre-trial detention of the Accused which would in turn impact on the Accused's preparation of his case.

- k) The Defence submits further that the question of judicial economy and resources were not properly considered by the Prosecution in bringing the amendments as the amendments would affect the status conference and the pre-trial briefs that have been slated to take place on the 4<sup>th</sup> March 2004 with a view to paving the way for the commencement of trials. Exercising discretion in favour of granting the amendments would re-commence the process de nouveau and would necessitate the initiation of fresh procedures which would be time-consuming, but could have been avoided had the Prosecutions conducted their investigations with due diligence and professionalism.
- l) 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 *insitu* and the investigations have been conducted within Sierra Leone, a situation markedly different from those which face the ICTR and ICTY in this respect. The Prosecution has unrestricted access to resources: human and material and also unhindered access to the length and breadth of Sierra Leone: where its offices are situated, the place of alleged commission of crimes and in addition is the seat of the Court. The above-mentioned factors provide a reasonable basis for the Prosecution to have fully utilised these resources and bring charges expeditiously having regard to the exigencies in time for the mandate of the Court. Prudent

Investigators within such a small country should have concluded such investigations within record time and expedite these trials to speedy conclusions having regard to the mandate of the Court.

- m) The Defence also submits that the amendments sought consist primarily of expansions in terms of the charges preferred and clarifications as well in terms of time and places of alleged commission of offences. The ICTR Appeals Chamber noted in the Bizimungu case that such an amendment would have been granted had the Prosecutor sought to solely add particulars to its general allegations because such an amendment would have positive effect on the trial. In this case, the Prosecution expands the scope of the current indictment in a manner prejudicial to the Accused.
- n) The Defence submits that questions that go the legality of the offences charged as crimes against humanity and fresh jurisdictional challenges would be raised should the proposed amendments allowed to stand. This would in effect mean that more time would be given after the disclosure relating to the alleged new charges would have been preferred. Again, the process to be initiated will lengthen the pre-trial process of the Accused.

## MISCELLANEOUS

- i) The Defence submits that the interests of justice dictate that the Trial Chamber should consider the proposed amendments in light of the overall effect on the fairness of the trial and consider whether or not it would place the Accused in position prejudicial to his fair trial rights. Furthermore, the Trial Chamber should also consider whether or not refusal of the amendments would undermine the mandate of the Court in light of preserving its integrity. The Chamber is also invited to consider whether or not the Prosecution had been diligent in the bringing this motion having regard to the fact that it has commenced investigations two



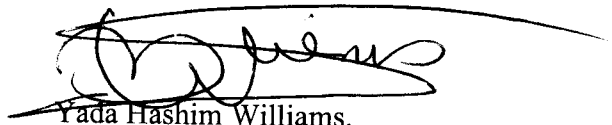
years ago and that its offices and the seat of the Court are situated in the country where the alleged crimes were committed. The Chamber is invited to consider whether refusal of the amendments could be cured by other factors such as adjournments etc and whether it would be prejudicial to the Accused<sup>8</sup>.

**CONCLUSION**

- i) The Defence submits that the principles listed above are factors that the Chamber should consider before exercising its discretion. The Defence further submits that that Prosecution has made no showing as to whether these factors were adequately considered before bringing this motion. In consequence, the motion should be dismissed in its entirety and the relief sought denied.

Dated the 19<sup>th</sup> day of February 2004

For the Accused



Yada Hashim Williams.

CO-COUNSEL.

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<sup>8</sup> Prosecutor v Alloys Simba, decision dated the 26<sup>th</sup> January 2004 (ICTR) where the Chamber listed the above principles to be considered before exercising their discretion. The cases cited as authorities are generally agreed upon these principles which should be considered before the Chamber exercises its discretion.

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## Defence list of authorities

1. Kordic and Cerkez,, Case IT-95-14/2, *Order on the Disclosure of Additional Information in respect of the Prosecutor's Motion for Leave to Amend the Indictment*, 21 May 1998.
2. Prosecutor v Kovacevic, Case IT-97-24-AR73, *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998*, 2 July 1998.
3. The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-Ar50, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, 12 February 2004.
4. Prosecutor v Brdanin & Talic, Case It-99-36-PT, *Decision on Form of Further Amended Indictment and Prosecution Application to Amend*, 26 June 2001.
5. The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, *Decision on the Prosecutor's Request for Leave to File an Amended Indictment*, 6 October 2003.