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SCSL-2004-14-PT
(405-416)

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN - SIERRA LEONE

Before: Judge Bankole Thompson

Judge Itoe

Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 24 February 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL - 2004 - 14 - PT

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

Office of the Prosecutor

Luc Côté

James Johnson

Adwoa Wiafe

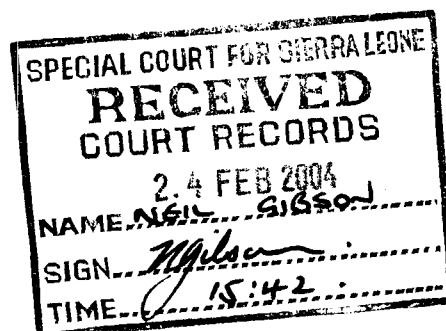
Defence

James Jenkin-Johnston

Michiel Pestman

Charles Margai

Defence Office



I. INTRODUCTION

1. On 9 February 2004, the Prosecution filed a Request for Leave to Amend the Indictment (“Prosecution Request”) against the Accused Norman, Fofana and Kondewa (“Accused”). Defence for the Accused filed responses on 19 February 2003. The Prosecution files this consolidated reply to objections raised by the Defence.

II. SUMMARY OF DEFENCE ARGUMENTS

2. The Defence argues in the respective responses that the Prosecution Request should be dismissed for the following reasons.
 - a. The Request will unduly delay the trial of the Accused.
 - b. The Amended Indictment contains additional allegations not included in the original or Consolidated Indictments.
 - c. The Prosecution offers no supporting evidence for the proposed amendments.
 - d. The Request to amend the Consolidated Indictment is not timely.
 - e. Defence for Fofana objects to discrepancies between the Consolidated Indictment and the original Indictment.
 - f. The Request is not in the interest of justice.
3. The Prosecution reiterates its arguments in the Request and prays that the Court reject the Defence motions for the reasons given below.

III. ARGUMENTS

A. The Request does not violate the right of the Accused to be tried without undue delay

4. The Prosecution submits that the requested amendments do not infringe any fundamental rights of the Accused. While the Prosecution acknowledges that the right of the Accused to an expeditious trial merits important consideration, the Prosecution submits that balanced against the overall interest of justice the proposed amendments will not violate this right.

5. The Prosecution reiterates its position that the question of undue delay is one of fact to be determined from the circumstances of the case. In determining whether a delay in the criminal proceedings against the Accused is 'undue,' it is essential for the Trial Chamber to consider the length of the delay, the gravity, nature and complexity of the case, as well as any prejudice that the Accused may suffer. The Prosecution submits that the amendments sought would not cause undue delay that would prejudice the Accused; considering the seriousness of the crimes involved, the Prosecution submits that to grant the amendments requested will be in the overall interests of justice and would not, adversely, affect the Accused' right to a fair trial.
6. Assuming, without conceding, that the proposed amendments will have an effect on trial dates, the Prosecution contends any perceived delay will be minimal. Given that no trial date has yet been set, it is impossible to determine with any certainty the question of the proposed amendments unduly delaying the commencement of trial. In fact, the Prosecution submits that the requested amendments should have no impact on the start date of the trial.
7. The Prosecution disagrees with the Defence that the judicial pronouncements of the Special Court on the right of the Accused to an expeditious trial, reflected in both the Appeals Chamber decision on the "Denial of the Right of Appeal" and the President's "Decision on Motion for the Modification of the Condition of Detention" in the Norman case, stand for the proposition that the right to an expeditious trial in the Special Court trumps all other considerations or, at the very least, is the single most important factor. Indeed, the right of the Accused to an expeditious trial has to be evaluated in light of the peculiar circumstances of the case.¹ Accordingly, in stating that "[a]rguments 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," the Prosecution submits that the President of the Court was not implying that legitimate requests, such as the present one, were to be rejected for the sole reason that they could have an impact on trial dates. The Prosecution has a duty to draw the attention

¹ *Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 12 December 2003, para. 13 (Cited in Prosecution Request).

of the Court to new facts that are uncovered during investigations and that it is working towards commencing trial at the earliest practicable time.

8. The international community, the people of Sierra Leone and the victims of these terrible crimes are all interested in the expeditious determination of the guilt or innocence of the Accused. The Prosecutor submits that this interest includes the expectation that the Court will be given the opportunity of assessing all the relevant facts, thus advancing the truth finding process.

B. Extended Time periods are not unfairly prejudicial to the rights of the Accused

9. With regard to Defence concerns about having to re-organise its investigations based on the extended time frames contained in the proposed Amended Indictment, the Prosecution disagrees with the Defence assertions that this will take them back to the starting point of their investigations since the proposed amendments are based on additional allegations which do not change the nature of the original charges and hence the investigations undertaken by the Defence so far. The Prosecution also submits that all the evidence relevant to the time periods in question have already been disclosed as part of the Prosecution's on-going disclosure obligations.

C. Additional locations in Amended Indictment envisaged in original Indictments

10. The additional locations in the Amended Indictment were incorporated to reflect the Bill of Particulars filed in the Kondewa case and to further particularize the allegations against the Accused persons.
11. It is the Prosecution's submission that notwithstanding the fact that the Bill of Particulars was filed in respect of the Kondewa case, the stated locations were envisaged in the Indictments against Norman and Fofana. The inclusion of the locations further particularizes the locations given in the original Indictments. The added particulars in the Amended Indictment better reflect the case that the Prosecution will seek to present at trial against the Accused and provide further notice to the Accused of the nature of the charges against them. It has been held by the ICTR that particularized notice in advance

- of trial of the Prosecution's theory of the case does not render the proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet his case.² Amendments such as these, which streamline both trial and appeal by eliminating objections that particular events are beyond the scope of the indictment, are acceptable.³
12. The Prosecution notes the Court's cautious approach to the slavish application of jurisprudence from sister tribunals, but asserts that legal principles expounded and applied in those tribunals are pertinent to the determination of analogous situations before the Special Court. In this case, specifying the locations in the Amended Indictment gives the Accused better notice of the case he has to meet. Taking the circumstances as a whole, the added locations do not render the trial of the Accused unfair.
13. Further, with the exception of the sexual violence charges, the Defence for Kondewa cannot allege that it was not on notice of the additional locations since these locations were incorporated in the Bill of Particulars filed in the Kondewa Case.

D. Proposed amendments based on sexual violence allegations do not prejudice rights of the Accused

14. The Defence also opposes the expansion of the counts in the proposed Amended Indictment to include charges based on sexual violence due to the fact that no such allegation had ever been levelled against the Accused. The Defence further argues that these new charges offend the right of the Accused to be informed of the charges against him promptly.
15. The Prosecution asserts that the content of an indictment depends on evidence available to the Prosecutor at the time it was issued. At the time that the Accused was indicted, allegations of sexual violence had not yet been substantiated and were therefore not included in the initial Indictment. However, since the arrest of the Accused the Prosecutor has been able to develop these allegations. Statements on which the sexual violence charges were preferred were taken in October and November 2003. The time lapse between the discovery of this evidence and the filing of the Prosecution Request was due to the need to thoroughly evaluate the evidence. Contrary to Defence assertions,

² Prosecutor v. Karemera, *supra* note 1, para. 27 (Cited in Prosecution Request).

³ *Id.*

the fact that the Prosecution seeks to charge the Accused now, as opposed to a year ago, in no way shows that the Prosecution was derelict in its duties as the original Indictment was a reflection of the evidence as it existed a year ago.

16. As regards questions raised by the Defence for Norman and Kondewa about the Prosecution's failure to include sexual violence charges in the CDF Indictments as was done in the AFRC and RUF cases, the Prosecution asserts that it is quite clear that the Accused in question belong to distinct groups. The fact that sexual violence charges were included in the Indictments against the AFRC and RUF members does not automatically mean that the same should have been done for the CDF.
17. Further, the right of an Accused to be informed promptly of the charges against him applies to charges contained in the indictment on the basis of which he was arrested.⁴ The Prosecutor submits that he not only does he have a duty, but it is in the interest of fairness and justice that serious crimes such as sexual violence crimes are incorporated in the indictment when discovered.
18. Looking at the specific charges of sexual violence in the indictment, it will be observed that the proposed amendments have been sufficiently particularized. Paragraph 31 alleges that the crimes were committed in the Bonthe District. The Prosecution has provided the specific locations where these crimes were committed, thus giving the Accused sufficient notice of the charges against them.

E. Material supporting the proposed amendments is sufficient

19. The Defence argues that no supporting witness statements have been disclosed in support of the new charges. According to the Defence, the Investigator's Statement attached to the Prosecution Request was insufficient supporting material. The Prosecution submits that the Investigator's Case Summary was sufficient basis of the existence of a factual basis for the Request. Moreover, the relevant statements have already been disclosed to the Defence.
20. Furthermore, relying on its arguments in the Request, the Prosecution submits that a Trial Chamber seized with a motion requesting leave to amend an indictment, pursuant to Rule

⁴ See, for e.g., *Prosecutor v. Kovacevic*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber Order of 29 May 1998, para 36 (Cited in Prosecution Request).

50, against an Accused who has already been indicted, need only consider whether the Prosecution has provided a sufficient legal and factual basis to justify the amendment. The Prosecution respectfully submits that it discharged its onus in this case by furnishing the Court with the factual basis of the new charges in the form of an Investigator's Statement. Under the SCSL Rules, this procedure is adequate even at the time of the confirmation of the original Indictment. The Investigator's Statement attached to the Amended Indictment, sets out the particulars of the charges and contains sufficient details as to the nature of the allegations against the Accused. The Defence is thus not denied the right to object to the proposed amendments.

F. The Prosecution Request was timely

i. Effect of proposed amendments on Status Conference

21. The Defence argues that the proposed amendments will be prejudicial to the Accused persons for the reason that having fixed the date for the Status Conference for March, it is anticipated that trials will soon commence. The Defence will thus be denied the opportunity of adequately preparing for trial. The Prosecution restates the argument that trial dates have not yet been fixed.
22. Further, the Prosecution deems it quite presumptuous that the Defence relies on tentative dates not only to determine its trial strategy but to also forecast the length of trial. The Prosecution is cognisant of the general objective of the Court to expedite trials. Equally important, is the need to present the best and complete evidence before the Court.

ii. The Prosecution was diligent in its investigations

23. The Defence sees no reason why having commenced investigations 2 years ago, the Prosecution could not have brought the proposed charges against the Accused long before the present time. The Prosecution submits that this categorical assertion by the Defence has no basis and should be disregarded. The question as to the time that the Prosecution started its investigations is totally immaterial to the Request. Furthermore, the Prosecution cannot anticipate the discovery of new facts. The Prosecution relies on its arguments in the Request that the proposed amendments indicate the full extent of the

Accused' guilt. Hence, allowing the Amended Indictment will enhance the integrity of the Court.

24. It is also a fact that trial preparation is an on-going process involving continuous investigations even after the arrest of the Accused; additional facts may come up in the course of evolving investigations. The consideration of such new facts is in the interest of a fair trial.
25. Finally, allegations that the Prosecution was not diligent in its investigations since the trials are being held in Sierra Leone, that Sierra Leone is a small country and that the Prosecutor has unlimited resources at his disposal are not relevant to ascertaining whether the Prosecution's motion is timely for the reasons stated above.

iii. Proposed amendments do not violate the right of Accused to be informed promptly of the charges against them

26. The right to be promptly informed of the charges against an Accused comes into play at the time when charges are brought. Consequently, in terms of the proposed amendments, the right of the Accused to be informed promptly of the charges against him arose at the time that the Request was filed and not at the time when the original Indictment was issued.
27. Considering the circumstances of this case, the Request was filed in timely fashion. Although the evidence on which the charges have been brought were discovered after the initial appearance of the Accused, this evidence had to be developed and verified for reliability before the Request could be filed.

iv. Fresh jurisdictional questions will not unduly delay the trial

28. The Defences' contention that the Request is untimely because the application of Rule 72 will unduly delay proceedings is misplaced. Any jurisdictional questions that arise will be confined to the additional charges. These Indictments have already been subject to preliminary challenges and decisions and the Prosecution respectfully submits that the additional count would not give rise to any sustainable preliminary challenges. Furthermore, the Prosecution submits that the fact that an amendment might result in a challenge under Rule 72 is not a basis to refuse the Request. Should the additional count

result in any motions under Rule 72, the Prosecution respectfully submits that the Trial Chamber is fully competent to expeditiously resolve any matters, especially with the benefit of existing jurisprudence.

29. Specifically, Defence for Norman argues that the charges based on the recruitment of child soldiers may have to be revisited as the arguments during the preliminary hearings were premised on there being no charges post Lome. The Defence concludes that the Prosecution seeks to capitalize on concessions made during the preliminary hearings by the Defence to gain “tactical advantage”. Clearly, these arguments are without merit and should be disregarded.
30. The Prosecution submits that the relevant time for the purposes of the Count 8 – use of child soldiers – is the entire period of the armed conflict which is limited only by the temporal jurisdiction of the Court, that is, after 30 November 1996. This can be inferred from paragraphs 4 and 9 of the Consolidated Indictment under the “General Allegations” section. The Prosecution submits that a distinction has to be drawn between the relevant time for Count 8 and the time periods given for the other counts in the Indictment. The offence of the use of child soldiers is a distinct charge which is continuous in nature. For this reason, the time period relevant to the charge on child recruitment does not depend on the specified time periods for the other counts in the Indictment.
31. Secondly, in the Prosecution’s view, there will be no need to revisit the issue of the impact of the Lome Amnesty on the charge of child soldiers in the Norman case since this was extensively dealt with through submissions from all the Accused during the preliminary hearings. The Prosecution concedes that the addition of new counts may result in the filing of preliminary motions on specific issues but disagrees with the Defence that the addition of new charges implies that preliminary motions already heard have to be reargued. Preliminary motions, if any, would have to be confined to the new charges.

G. ADDITIONAL ARGUMENTS

i. Discrepancies between Consolidated Indictment and original Indictment of Fofana

32. The Prosecution thanks the Defence for pointing out discrepancies between the Amended Indictment and the Request. The Prosecution takes this opportunity to clarify and correct the inconsistencies.

1) Paragraph 14(i) of the Prosecution Request should read as follows: (i) paragraph 25.d – time frame amended from “in or about January and February 1998” to “between about January 1998 and April 1999”. [para. 26.d of the Amended Indictment].

2) Paragraph 14(ii) of the Request should read as follows: (ii) paragraph 26.a – time frame “between about 1 November 1997 and 30 April 1998” to “between about 1 November 1997 and about 31 August 2000”. [para. 27.a of the Amended Indictment].

33. Defence for Fofana further argues that the Consolidated Indictment contains new allegations not dealt with in the Request, referring to paragraphs 25.a, 25.b, 26.a and 27.a of the Consolidated Indictment. The Prosecution submits that these locations were incorporated in the Consolidated Indictment pursuant to the order of the Court in the Kondewa case for the Prosecution to file a Bill of Particulars and were envisaged in the Indictment against the Accused.

34. The fact that the added locations were envisioned in the original Indictments can be inferred from the wording of the original Indictment. In paragraphs 20, 21 and 22 of the original Indictment against the Accused, the Prosecution uses phrases such as “at or near” and “surrounding areas” to show that the crimes were committed in areas other than those specified. For example, in paragraph 19.a of the original Indictment, the Prosecution alleged that “between 1 November 1997 and about 1 April 1998, multiple attacks on Tongo Field and *surrounding areas and towns* during which the Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants.” [Emphasis added]. Then in paragraph 20.a the Prosecution alleges that “between 1 November 1997 and 30 April 1998, *at or near Tongo Field*, Kamajors unlawfully killed an unknown number of

civilians and captured enemy combatants.” [Emphasis added]. Read together, these paragraphs indicate that locations other than Tongo Field were intended in the original Indictment. In incorporating these specific locations, the Prosecution sought to particularize the charges in the Fofana Indictment to reflect the Bill of Particulars filed in respect of the Kondewa case, ensuring uniformity in the charges.

ii. Difficulties in interpreting additional charges to the Accused not a ground for refusing Request

35. The Defence raises the issue of the likely difficulties in interpreting the new charges to the Accused. According to the Defence, this is a time consuming task which will take the Defence to the starting point of case preparation. The Prosecution fails to see how having to interpret additional charges to the Accused will take the Defence back to the starting point. Moreover, is an insufficient basis for denying the Prosecution Request.

iii. Timing of the amendments has not denied the Accused the right to object to joinder

36. Defence for Norman submits that as a result of the Prosecution’s failure to amend the Indictment before the joinder hearings, Defence has been denied the opportunity of objecting to the joint trial on the new allegations and the expanded time frames. The Prosecution asserts that issues pertaining to the application for the joint trial of the Accused have no bearing on the issues at hand. In any case, as held in the joinder decisions, trials before International Tribunals are held before professional judges with adequate training and skill to appropriately evaluate the evidence in respect of each Accused.

H. INTEREST OF JUSTICE

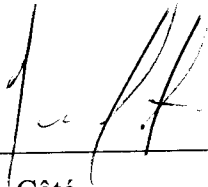
37. In conclusion, the Prosecution submits that, at this stage of the proceedings, the addition of the proposed charges in the Amended Indictment should not present an unfair surprise, and the investigation of such charges by the Defence should not present unreasonable or impracticable delays. Any potential prejudice to the Accused must be assessed in the context of the overall interest of justice in a full and final determination of the guilt of the

Accused. The Prosecution submits that the proposed amendments reflect the full extent of the Accused' culpability. Consequently it is in the interest of justice that the Court allows the amendments.

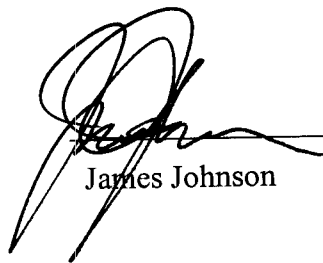
IV. CONCLUSION

38. For the reasons stated above, the Prosecution prays that its Request be granted and the Defence objections rejected.

Freetown, 24 February 2004



Luc Côté



James Johnson