

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: 8 December 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN**MOININA FOFANA****ALLIEU KONDEWA****CASE NO. SCSL – 2004 – 14 - T**

REQUEST FOR LEAVE TO AMEND THE INDICTMENT AGAINST NORMAN

Office of the Prosecutor

Luc Côté

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John Wesley Hall

SPECIAL COURT FOR SIERRA LEONE		
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I. Introduction

1. The Prosecution files this motion under Rule 50 of the Special Court Rules of Procedure and Evidence requesting leave to amend the indictment against Norman (“First Accused”) and pursuant to the direction of the Court contained in the “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment” dated the 29th of November 2004 (the “Decision on Service and Arraignment”)¹. The Prosecution requests that the indictment against the First Accused Norman be amended to include the additional factual material annexed to the application as contained in the current Consolidated Indictment.

II. Procedural Background

2. On 7 March 2003 his Honour Judge Itoe approved the indictment against the First Accused, charging him with 8 counts of crimes against humanity and war crimes. He was arraigned on 15, 17 and 21 March 2003 and pleaded “not guilty” to all 8 counts.
3. On the 26 June 2003 his Honour Judge Bankole Thompson approved separate indictments against the Second and Third Accused, charging them with the same 8 counts of crimes against humanity and war crimes. The indictments against Fofana and Kondewa were similar to the Norman indictment except for additional factual allegations and time frames including the districts of Bonthe and Moyamba not contained in the initial Norman indictment.
4. On 7 November 2003 the Third Accused filed a motion for defects in the form of the original indictment.² By a decision rendered by the Trial Chamber on 27 November 2003³ the Trial Chamber ordered the Prosecution to delete the phrase “including but not limited to these events” wherever they appeared in the indictment and file either a Bill of Particulars or apply for an amendment to the indictment. Pursuant to this order, the

¹ *Prosecutor v. Norman, Fofana & Kondewa*, “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, SCSL Trial Chamber, SCSL-04-14-T, 29 November 2004. (hereinafter “Decision on Service and Arraignment”)

² *Prosecutor v. Kondewa*, SCSL-2003-12-PT, “Preliminary Motion Based on Defects in the Form of the Indictment Against Kondewa”, 7 November 2003.

³ *Prosecutor v. Kondewa*, SCSL-2003-12-PT “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”, 27 November 2003 (hereinafter “Decision on Form of Indictment, 27 November 2003”).

Prosecution filed a Bill of Particulars on 5 December 2003⁴ that contained additional factual allegations envisaged in the original Kondewa indictment.

5. On the 9th October 2003 the Prosecution filed a motion for the joint trial of the three accused.⁵ The Prosecution further requested that a Consolidated Indictment be filed on which the joint trial would proceed. The Prosecution submitted that the Consolidated Indictment would combine all the three indictments into one superseding indictment. On the 27th January 2004, in its “Decision and Order on Prosecution Motions for Joinder”(the “Joinder Decision”), the Trial Chamber ordered a joint trial of the three accused and further ordered that a superceding Consolidated Indictment be filed and served on the Accused by the Registry. Based on this Order, the Prosecution filed the Consolidated Indictment on the 5th of February 2004. This Consolidated Indictment combined all three indictments into a single and whole indictment and, therefore, included all the allegations contained in the original Norman, Fofana and Kondewa indictments including the Bill of Particulars filed in the Kondewa case. The phrase “including but not limited to these events” was also removed from the Consolidated Indictment and additional factual allegations reflected in the Kondewa Bill of Particulars and the locations of Bonthe and Moyamba added. The Registry served the indictment on Defence Counsel but not personally on the Accused. Defence Counsel for Norman did not object to the Consolidated Indictment when it was served.
6. The trial (first session) of the three accused on the Consolidated Indictment commenced on 3 June 2004. No objection was taken to the Consolidated Indictment. At the beginning of the second trial session in September 2004, the First Accused made an oral submission to the Court that he had not been properly arraigned on the Consolidated Indictment. The First Accused then filed, the “Motion for Service and Arraignment on Second Indictment”, on the 21 September 2004 seeking service and arraignment on the Consolidated Indictment and requesting that the Trial Chamber quash the initial indictment of 7th of March 2003.

⁴ *Prosecutor v. Kondewa*, SCSL-2003-12-PT, “Bill of Particulars”, 5 December 2003 (hereinafter, “Bill of Particulars”).

⁵ *Prosecutor v Norman, Prosecutor v Fofana, Prosecutor v Kondewa*, “Prosecution Motion for Joinder”, 9 October 2004.

7. In the “Decision for Service and Arraignment”, the Trial Chamber identified select portions of the Consolidated Indictment as containing new factual allegations and substantive elements. The Prosecution was ordered to apply either for leave to amend the Consolidated Indictment in respect of the impugned portions or to expunge the impugned portions altogether.
8. Pursuant to this direction of the Trial Chamber, the Prosecution now files this application to amend the indictment against the First Accused to reflect the additional factual allegations in the Consolidated Indictment.

III. Scope of the Amendments

9. The Prosecution seeks to amend the indictment against Norman as identified in paragraph 19 of the majority decision in the “Decision for Service and Arraignment”. The amendments are attached as **Annex 1** (paragraph 19 of the Decision) as follows:
 - i. The addition of the districts of Moyamba and Bonthe in paragraphs 23, 24(d), 24(e), 25(e), 25(f) and 27;
 - ii. The incorporation additional locations contained in the Bill of Particulars filed in the Kondewa case;
 - iii. The extension of the time frames in paragraphs 25(a), 26(a) and 26(b); and
 - iv. Other factual allegations in paragraphs 24, 25(g), 26(b), 27 and 29.

IV. The Law

10. Rule 50(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the “Rules”) provides that after the initial appearance of an accused, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and 52 apply to the amended indictment.⁶
11. Rule 50 does not prescribe a time limit for amending an indictment, hence an amendment may be sought at any stage of the trial.⁷ However, after the initial appearance of the accused, the granting of an amendment is at the discretion of the Court.⁸ In making its

⁶ The SCSL Rule 50(A) is identical to Rule 50(A) of the ICTR Rules and Rule 50(A)(i) of the ICTY Rules.

⁷ See also *Prosecutor v Akayesu*, ICTR Appeals Chamber, ICTR-96-4, “Judgment”, 1 June 2001, para 120.

⁸ *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. 2 (hereinafter “Kabiligi & Ntabakuze-Decision on Motion

decision, the Court must weigh the overall interests of justice, in particular the rights of the Accused enshrined in Article 17 of the SCSL Statute,⁹ against the particular circumstances of the case including the need for the Prosecution to present all relevant evidence before the Court.¹⁰ Further, an amendment may only be granted after the Prosecution has established sufficient legal and factual basis for the application.¹¹

12. The Prosecution submits that sufficient legal and factual basis exists in this case for the proposed amendments. Furthermore, given the peculiar circumstances of this case, the additions will not unduly prejudice the rights of the accused persons to prepare their defence or unduly delay the trials, as they do not fundamentally alter the case against them.

V. Arguments

13. The Prosecution submits that the amendments to the indictment being sought are timely, considering the scope of the amendments and the overall circumstances of the case. The Prosecution further submits that these amendments to the indictment will not cause unfair prejudice to the accused persons. The accused have been on notice of the nature and particulars of the charges against them since 5 February 2004 or earlier and, therefore, no undue delay will occur if the indictment is amended at this stage.

A. Timing of the Amendments

14. The Prosecution notes at the outset that the amendments are being sought at this stage because it had earlier considered that the additional time frames and geographical locations did not constitute new charges. Given the scope and nature of the case against the accused, the Prosecution took the view that the additional time frames and geographical locations of Bonthe and Moyamba were additional particulars, notice of which had been given to the First Accused in the form of disclosed statements.¹² Hence,

to Amend, 8 October 1999”); *Prosecutor v. Musema*, ICTR-96-13-T, “Decision on the Prosecutor’s Request for Leave to Amend the Indictment”, 6 May 1999, para. 17 (hereinafter “Musema- Decision on Leave to Amend, 6 May 1999”).

⁹ Musema- Decision on Leave to Amend, 6 May 1999, para. 17.

¹⁰ *Id.*, para. 18.

¹¹ Kabiligi & Ntabakuze-Decision on Motion to Amend, 8 October 1999, para. 2.

¹² The same applies to factual allegations such as unlawful arrest and detention, conscription of children, personal injury and extortion of money from civilians did not lead to “new charges” against the Accused. These provide additional bases for the charges.

no amendments to the Norman indictment were deemed necessary upon the consolidation of the indictments.

15. Furthermore, following the “Decision on the Form of the Indictment, 27 November 2003” in the Kondewa case, the Trial Chamber ordered the Prosecution to delete certain general language from the indictments and enumerating additional events envisaged by the indictments, thereby giving them greater specificity.¹³
16. The Trial Chamber held in the RUF case that the additional allegations provided in the form of a Bill of Particulars in the Sesay and Kanu cases “are integrally part and parcel of the Original Indictments.”¹⁴ The Court further opined, although no Bill of Particulars had been filed in respect of Kallon, that as a result of the consolidation “...*the additional allegations particularised in the Bills of Particulars do put all three Accused on notice as to additional incidents or events in respect of which the Prosecution may be adducing evidence at the trial, so that none of them will be taken ex improviso as to the alleged matters.*”¹⁵ As such, in consolidating the three indictments the Prosecution deleted the phrase “included but not limited to,” adding instead the specific geographic locations supplied in the Kondewa Bill of Particulars¹⁶ notwithstanding the absence of an order to file a Bill of Particulars in the Norman case. The Prosecution took the position at that time that the Bill of Particulars applied by necessary implication to all the three accused.¹⁷
17. However, in light of the recent decision by this Trial Chamber on the Norman arraignment motion, the Prosecution now seeks leave to amend the indictments against First Accused to reflect the factual allegations in the Consolidated Indictment.

¹³ *Prosecutor v. Sesay*, “Decision and Order of Defence Preliminary Motion for Defects in the Form of the Indictment”, SCSL-2003-05-PT, 13 October 2003, para. 33; *Prosecutor v. Kanu*, SCSL-2003-13-PT, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”, 19 November 2003; Decision on Form of Indictment, 27 November 2003, para. 11. See also Bill of Particulars.

¹⁴ *Prosecutor v. “Kallon et al*, “Kallon-Decision on Motion for Quashing of Consolidated Indictment”, 21 April 2004, para. 21 (hereinafter “Decision on Motion for Quashing, 21 April 2004”)

¹⁵ Decision on Motion for Quashing, 21 April 2004, para 21.

¹⁶ See Decision on Form of Indictment, 27 November 2003, In this decision, the Court ordered the Prosecution to delete the phrase “including but not limited to” in every count or wherever they appear in the Indictment and provide in a Bill of Particulars specific additional events alleged against the Accused in each count.

¹⁷ Decision on Motion for Quashing, 21 April 2004, para. 21. The Court stated: “We wish to emphasise that the fact that the Accused, Morris Kallon, never filed a motion challenging the formal validity of his Original Indictment does not provide a legal basis for quashing the Consolidated Indictment. He is not at all prejudiced by the additional specificity provided by the Prosecution in the Bills of Particulars in respect of the other Accused persons since he legally stands to benefit from the nature and extent of the degree of particularity provided by the Prosecution in respect of the allegations ruled by the Chamber to have impermissibly vague, imprecise and uncertain.” Of note, the Bill of Particulars filed in the RUF case introduced additional events in support of the existing counts, including several entirely new geographical locations that did not exist in the initial indictments.

B. No prejudice to Accused at this stage of the proceedings (Article 17)

18. The fundamental issue concerning the Accused's rights under Article 17 of the Statute is whether the amendment will unfairly prejudice the accused. An accused is unfairly prejudiced where an amendment to the indictment would infringe upon his right to a fair trial, specifically whether the accused was informed of the case he has to meet, or whether the amendments would cause undue delay of the trial.¹⁸

i. Fairness of the Proceedings: The Accused Were Informed of the Charges against Them

19. The fundamental purpose of the indictment process is to ensure "substantial safeguards...intended to furnish to an accused, namely to inform him of the case he has to meet."¹⁹ The Court must determine whether the accused would be unfairly prejudiced in the preparation of his defence.²⁰ It is the Prosecution's submission that the additional events and details included in the proposed amendments put the accused more precisely on notice of the events which underlie the counts with which he is being charged. The precision and clarity of the indictment enhance the fairness of the proceedings²¹ in that it helps the accused in his ability to prepare his defence.²²

20. The Prosecution submits that the preparation of the defence and investigations would not differ from that of the first three trial sessions, considering that nature of the case against him will not change in any significant way by the proposed amendments, which define in more detail the counts already set against the accused. The additional locations in Kenema and Bo district fall within the same geographical region and reflect the additional

¹⁸ *Prosecutor v. Brdjanin and Talic*, ICTY Trial Chamber, IT-99-36, "Decision on Form of Further Amended indictment and Prosecution Application to Amend", 26 June 2001, para. 50; *Prosecutor v. Eliezer Niyitegeka*, ICTR Trial Chamber, ICTR-96-14-1, "Decision on Prosecutor's Request for Leave to File an Amended Indictment", 21 June 2000, paras. 36 and 37.

¹⁹ *Prosecutor v. Kuprekcic*, IT-95-16-A, "Appeal Judgment", 23 October 2001, para. 88-95.

²⁰ *Prosecutor v. Ljubcic*, IT-00-41-PT, "Decision on Motion For Leave to Amend the Indictment", 2 August 2002 (hereinafter "Ljubcic-Decision on Leave to Amend, 2 August 2002").

²¹ *Prosecutor v. Mikaeli Muhimana*, ICTR Trial Chamber, ICTR-1995-1B-I, "Decision on Motion to Amend Indictment", 21 January 2004, para. 5 (hereinafter "Muhimana-Decision on Amendment, 21 January 2004").

²² Muhimana-Decision on Amendment, 21 January 2004, para. 5; Decision on Motion for Quashing, 21 April 2004, para 21.

particulars provided in the Kondewa Bill of Particulars.²³ The evidence relating to allegations involving Kenema, Bo Town and surrounding areas have been presented in court. The evidence relating to Bonthe and Moyamba were also disclosed in timely manner in August 2003. Further, the Prosecution notes that the evidence on Bonthe was presented before the court in the third trial session.

21. Although the time frame contained in paragraphs 25(a)²⁴ and 26(a)²⁵ of the Consolidated Indictment have been extended in relation to the First Accused, the Prosecution submits that such extensions are not so substantial as to prejudice the accused. While the time frame listed in paragraph 26(b) has been extended by over a year, the evidence pertaining to the allegations has been disclosed. Furthermore, the evidence on the Bonthe crime base has already been presented to the Court.
22. The change from “conscript” to “initiate” in the particulars in Count 8 does not fundamentally alter the charge since the actual charge or count is “enlisting [and not conscription] children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities”. Likewise, in paragraph 27 of the Consolidated Indictment, the change from “private property” in the original indictment to “civilian property” in the Consolidated Indictment does not prejudice the accused since, in the Prosecution’s view, the latter is encompassed in the former with the latter being the more specific term.
23. Further, the addition of the element of unlawful killing to paragraph 25(g) of the Consolidated Indictment does not change the nature of the charge in the original indictment. Paragraph 20, the corresponding paragraph in the original indictment, when read as a whole, refers to unlawful killings.²⁶
24. The First Accused has been on notice of the charges in the Consolidated Indictment against him for some time through the disclosures made, the Consolidated Indictment

²³ Norman et al, SCSL-04-14-T, Decision on the Second Accused’s Motion for Service and Arraignment of the Consolidated Indictment, 6 December 2004, para. 34.

²⁴ Extension from “1 November 1997 to 1 February 1998” to “1 November 1997 to 30 April 1998”.

²⁵ Extension from “1 November 1997 to 1 April 1998” to “1 November 1997 to 30 April 1998”.

²⁶ Paragraph 20 of the original Norman indictment states: “Unlawful killings included, but were not limited to the following:” and then sets forth the particulars of the unlawful killings in sub paragraphs.

itself, the Prosecution's Supplemental Pre-Trial Brief and the Prosecutor's Opening Statement.²⁷

25. Statements disclosed in May 2003 and July 2003²⁸ and soon thereafter contained details of the charges against the First Accused. He was further informed of additional particulars on 5 February 2004 in the Consolidated Indictment, the Prosecution's Supplemental Pre-Trial Brief filed on 22 April 2004²⁹ and the Prosecution's Opening Statement on 3 June 2004. The trial did not commence until 3 June 2004. The First Accused has been defending himself, through self-representation, stand-by counsel, or court appointed counsel on the basis of the particulars articulated in the Consolidated Indictment. The Defence for the First Accused have been defending on these particular allegations and up to this point have given no indication that the defence was incapable of responding to the charges.
26. The Prosecution further notes that the basis of the First Accused's objection to the Consolidated Indictment was not that he lacked notice of the charges contained in the Consolidated Indictment but that he had not been properly served and arraigned on it given the expanded factual allegations against him.³⁰
27. The Prosecution submits that due to the fact that the accused has been fully informed of the case he must meet in these different forms, the issue of unfair surprise does not arise. The proposed amendments not only further particularise the charges against the Accused, thus clarifying the Prosecution's case, but are necessary to ensure the indictment accurately reflects the state of the evidence already presented before the court as well as the anticipated evidence already disclosed.

²⁷ Decision on Service and Arraignment. At paragraph 28, his Honour Judge Boutet noted: "The Jurisprudence of the Tribunal accepts that a defendant may not be unfairly prejudiced where the defence is put on reasonable notice of the Prosecution case before trial, for example, in the Prosecution Pre-Trial Brief, or at the latest, in the Prosecution opening Statement."

²⁸ The allegations in the Bonthe and Moyamba locations were disclosed in the July 2003 disclosure package along with the disclosures to Fofana and Kondewa.

²⁹ *Norman et al.*, SCSL-2004-14-PT, "Prosecution Supplemental Pre-trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", 22 April 2004, paras. 13, 21, 30, 38, 39, 84, 120, 273, 274, 276, 281, 290, 298-305, 306-313, 314, 330, 351, 373-376, 380-386, 391.

³⁰ *Norman et al.*, SCSL-04-14-T, "Motion for Service and Arraignment on Second Indictment", 20 September 2004, para. 9 & 10.

ii. Amendments Will Not Result In Undue Delay

28. The accused has the right to trial without undue delay. The issue of whether undue delay will be caused depends on the overall circumstances of the case³¹ including the following: (1) the circumstances of the particular case, including whether any improper or tactical advantage was sought by the Prosecution; and (2) the exceptional nature of criminal proceedings involving war crimes, including the general complexities and difficulties inherent in the investigation of such crimes.³²

a. Circumstances Of The Particular Case Lead To No Undue Delay.

29. A substantial delay would be undue if it occurred because of any improper tactical advantage sought by the prosecution.³³ Whether any improper tactical advantage was sought by the prosecution should be determined by an examination of the diligence of the prosecution in making these amendments.³⁴ This determination should be viewed in light of the Prosecution's "duty to bring all relevant issues in front of the Trial Chamber" and "prosecute to the fullest extent of the law."³⁵

30. The Accused will not suffer a substantial delay if request for leave to amend is granted. The Accused was fully informed of the charges and the particulars of those charges that the Prosecution intended to bring against him. In fact, no delay is necessary in order to safeguard the rights of the accused to a fair trial.

31. Moreover, no improper tactical advantage was sought by the Prosecution in seeking the amendments at this stage. As already noted, the additional factual allegations have long been disclosed and the First Accused further notified of the charges through various means.

32. The Prosecution has a "duty to bring all relevant issues in front of the Trial Chamber" and "prosecute to the fullest extent of the law."³⁶ This includes an obligation to accurately

³¹ *Prosecutor v Kovacevic* ICTY Appeals Chamber, IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998, para. 28 (hereinafter "Kovacevic -Reasons for Appeals Chamber's Order, 2 July 1998")

³² Muhimana-Decision on Amendment, 21 January 2004, para. 4.

³³ Kovacevic-Reasons for Appeals Chamber's Order, 2 July 1998, para. 32

³⁴ Muhimana-Decision on Amendment, 21 January 2004, para. 6.

³⁵ Ljubicic-Decision on Leave to Amend, 2 August 2002.

³⁶ Ljubicic-Decision on Leave to Amend, 2 August 2002.

reflect the full nature of the accused's conduct in relation to the charges set forth against him. The additional geographic zones and time frames are being sought by the Prosecution in fulfilment of this duty.


b. The Exceptional Nature of War Crimes Proceedings

33. Finally, the exceptional nature of the criminal proceedings involving war crimes must be considered in the determination of whether undue delay will ensue.³⁷ The ICTY has emphasized the general complexities inherent in the prosecution of such crimes.³⁸ The First Accused has been indicted on eight counts including war crimes and crimes against humanity committed throughout the Southern and Eastern Regions of Sierra Leone over a number of years. The complexities are magnified in this case due to the scale and variety of the allegations in the indictments. Considering the nature of this criminal proceeding, the Prosecution submits that flexibility regarding judicial discretion in allowing amendments is necessary, especially in this case where the evidence has either been disclosed or presented at trial.³⁹

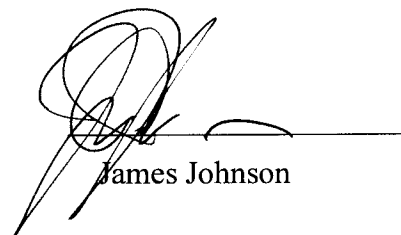
VI. Relief Sought

34. Based on the foregoing, the Prosecution respectfully requests the Trial Chamber to grant the amendments attached as **Annex 1** to the factual allegations against the First Accused to reflect the Consolidated Indictment as it appears now.

Freetown, 8 November 2004,



Luc Cote



James Johnson

³⁷ Muhimana-Decision on Amendment, 21 January 2004, para. 4.

³⁸ Ljubicic-Decision on Leave to Amend, 2 August 2002

³⁹ Ljubicic-Decision on Leave to Amend, 2 August 2002

Annex 1
Proposed Amendment

time, were formally served with a copy of the Consolidated Indictment on the 5th of February, 2004, and their obligation consisted of representing their client, which included to familiarise him with the charges against him. The Accused did not raise this issue of non-service during the Pre-Trial Conference or any of the Status Conferences. Furthermore, the Accused responded to the charges against him in his Pre-Trial Brief filed on the 31st of May, 2004, and has defended the charges against him in the first and second sessions of the CDF trial.

15. Before making any conclusive finding on this issue of unfair prejudice, however, 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 the Accused and would therefore constitute new charges as contemplated by Rule 50 of the Rules.

2. Differences Between the Initial Indictment and Consolidated Indictment

16. The Trial Chamber is aware that it is not its function to ascertain for itself whether the form of an Indictment complies with the pleading principles as outlined in the Rules, as this is normally a function for the parties, although a Court is entitled *proprio motu* to raise issues as to the form of an Indictment, particularly when such matters may affect the fairness of the process. In accordance with the principle of a fair trial, and the obligation to consider any unfair prejudice that may ensue from non-service and arraignment on the Consolidated Indictment, the Trial Chamber will consider whether there are any new charges to the Consolidated Indictment by comparison to the Initial Indictment.

17. The Prosecution assert that the Consolidated Indictment contains no additional charges against the First Accused. It should be observed that when the Prosecution applied for joinder of the trial of the three Accused persons, it did not exhibit the proposed Consolidated Indictment. The Prosecution submitted that the Consolidated Indictment would not amend the Initial Indictments but that it was confined to a "mere putting together" of the three Initial Indictments. The Prosecution submitted that there was no need for further approval of the Consolidated Indictment "given it will not involve any change in the substance of the original Indictments".¹

18. Based upon these submissions by the Prosecution, and without the benefit of an appended Indictment to the Motion for joinder, the Trial Chamber held in its Joinder Decision that a comparison of the Indictments of the three Accused "reveals that the specific crimes charged in those several counts are exactly the same, except for the allegations in respect of additional time and locations as regards Accused Moinina Fofana and Allieu Kondewa, which is an issue of no materiality for the instant purpose".²

19. Upon receiving this Motion from the First Accused, and consequently proceeding to specifically review the differences between the Initial Indictment against the First Accused with the Consolidated Indictment, the Trial Chamber notes that the following changes have been made:

- (a) Paragraph 23 (CI) - This paragraph refers to the armed conflict occurring in various parts of Sierra Leone. In the Initial Indictment (II), the qualifier, "but not limited to" is given. The CI adds the "towns of Tongo Field", instead of just Tongo Field, "and surrounding areas and

¹ Prosecution Motion for Joinder, para. 10.

² Para. 24.

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the Districts of Moyamba and Bonthe” for parts of Sierra Leone where the armed conflict allegedly occurred.

(b) Paragraph 24 (CI) - This paragraph adds to the actions committed by CDF, largely Kamajors, “personal injury and the extorting of money from civilians”. Subparagraph

(c) adds that the Kamajors not only attacked, but “took control of” various towns, and instead of allegations that Kamajors destroyed and looted, the CI alleges that Kamajors “unlawfully” destroyed and looted. Subparagraphs (d) and (e) are entirely new and state that:

(d) Between October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected “Collaborators” and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.

(e) Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bemebay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected “Collaborators” and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.

Additions to subparagraph (f) are that the CDF blocked all major highways and roads leading “to and from”, which previously referred to “leading to” only.

(c) Paragraph 25 (CI) - subparagraph (a) extends the timeframe for alleged commission of unlawful killings to 30 April 1998, instead of 1 February 1998 as in the II. Additional places are mentioned where the killings allegedly took place, including “at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun”. The II used general language “but were not limited to” and referred to “at or near Tongo Field”. Subparagraph (b) included “District Headquarters town of” Kenema, whereas the II just referred to “Kenema” and added “at the nearby locations of Blama”. Subparagraph (c) adds “Kamajors unlawfully killed”; Subparagraph (d) adds “including the District Headquarters town” and “Kebi Town, Kpeyama, Fengehun and Mongere” and that “Kamajors unlawfully killed”. Subparagraphs (e) and (f) are new and were not in the II. These subparagraphs state:

(e). between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;

(f). between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians.

Additions to subparagraph (g) included “unlawfully killed” and capture of enemy combatants “in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway”.

(d) Paragraph 26 (CI) - subparagraph (a) extends the timeframe for alleged commission of acts of physical violence and infliction of mental harm or suffering to 30 April 1998, which previously was 1 April 1998. Blama and Kamboma are also listed as areas where the acts were committed. Kenema is also qualified as “Kenema town”. Subparagraph (b) of the II referred

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to commission of acts from 1 November 1997 to 1 April 1998, and the CI refers to November 1997 to December 1999 and adds "in the towns of" for Tongo Field and "the Districts of Moyamba and Bonthe". The subparagraph further adds the offences of "illegal arrest and unlawful imprisonment". The II used general language of "but not limited to".

(e) Paragraph 27 (CI) - this paragraph alleging looting and burning adds the locations of "Kenema District, the towns of Kenema, Tongo Field and surrounding areas", "District" to Bo, "the towns of Bo", "Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas". This paragraph also refers to the unlawful taking and destruction by burning of "civilian owned" property, instead of "private" property".

(f) Paragraph 29 (CI) - adds that the CDF "conscript" instead of "initiate" children under the age of 15 years into armed forces or groups "throughout" the Republic of Sierra Leone.

Other changes to the CI include, for example, reference to "CDF, largely Kamajors", instead of Kamajors, as in the II.

20. Upon a detailed comparative analysis of the differences between the Initial Indictment for the First Accused and the Consolidated Indictment, the Trial Chamber comes to the conclusion that the factual allegations adduced in support of existing confirmed counts in the Initial Indictment (II) have been expanded and elaborated upon in the Consolidated Indictment (CI), and that, furthermore, some substantive elements of the charges have been added.

21. The Trial Chamber turns now to consider *proprio motu* whether these additions and changes to the Consolidated Indictment are material to the Indictment, in which case an unfair prejudice might enure to the Accused on account of him facing these changes, having not been personally served and arraigned on the Consolidated Indictment, or alternatively, whether the additions simply provide greater specificity to general allegations, that are not material.

3. Pleading Principles for an Indictment

22. An Indictment, as the primary accusatory instrument against an Accused person, must plead the essential aspects of the Prosecution case with sufficient detail. In accordance with Rule 47(c) of the Rules:

The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

23. If the Prosecution fails to plead the essential aspects of the Prosecution Case in the Indictment, it will suffer from a material defect.³ As stated by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Kupreskic* case:

It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.⁴

³ *Prosecutor v. Kupreskic*, Appeals Judgement, para. 114.

⁴ *Supra*, para. 92.

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Annex 2 – Index of Authorities

1. *Prosecutor v. Kondewa*, SCSL-2003-12-PT, “Preliminary Motion Based on Defects in the Form of the Indictment Against Kondewa”, 7 November 2003.
2. *Prosecutor v. Kondewa*, SCSL-2003-12-PT, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”, 27 November 2003.
3. *Prosecutor v. Kondewa*, SCSL-2003-12-PT, “Bill of Particulars”, 5 December 2003.
4. *Prosecutor v Norman, Prosecutor v Fofana, Prosecutor v Kondewa*, “Prosecution Motion for Joinder”, 9 October 2004.
5. *Fofana et al*, SCSL-2004-14-T, “Motion for Service of Consolidated Indictment and a Further Appearance”, 21 October 2004.
6. *Kondewa et al*, SCSL-2004-14-T, “Motion for Service of Consolidated Indictment and a Further Appearance”, 4 November 2004.
7. *Prosecutor v. Niyitegeka*, ICTR-96-14-I, “Decision on Prosecutor’s Request for Leave to file an Amended Indictment”, 21 June 2000.
URL:<http://www.ictr.org/ENGLISH/cases/Niyitegeka/decisions/2106>
8. *Prosecutor v. Akayesu*, ICTR Appeals Chamber, ICTR-96-4, “Judgment”, 1 June 2001.
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9. *Prosecution v. Kabiligi & Ntabakuze*, ICTR-97-30-I, “Decision on the Prosecutor’s Motion to Amend the Indictment”, 8 October 1999.
URL:<http://www.ictr.org/ENGLISH/cases/Kabiligi/decisions/dec991008B.htm>
10. *Prosecutor v. Musema*, ICTR-96-13-T, “Decision on the Prosecutor’s Request for Leave to Amend the Indictment”, 6 May 1999.
11. *Prosecutor v. Sesay*, “Decision and Order of Defence Preliminary Motion for Defects in the Form of the Indictment”, SCSL-2003-05-PT, 13 October 2003.
12. *Prosecutor v. Kanu*, SCSL-2003-13-PT, “Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment”, 19 November 2003.

13. *Prosecutor v "Kallon et al*, "Kallon-Decision on Motion for Quashing of Consolidated Indictment", 21 April 2004.
14. *Prosecutor v. Brdjanin and Talic*, ICTY Trial Chamber, IT-99-36, "Decision on Form of Further Amended indictment and Prosecution Application to Amend", 26 June 2001.
URL: <http://www.un.org/icty/brdjanin/trialc/decision-e/10626FI215879.htm>
15. *Prosecutor v. Kuprekic*, IT-95-16-A, "Appeal Judgment", 23 October 2001.
URL: <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>
16. *Prosecutor v. Ljubicic*, IT-00-41-PT, "Decision on Motion For Leave to Amend the Indictment", 2 August 2002.
URL: <http://www.un.org/icty/ljubicic/trialc1/decision-e/06104513.htm>
17. *Prosecutor v. Mikaeli Muhimana*, ICTR Trial Chamber, ICTR-1995-1B-I, "Decision on Motion to Amend Indictment", 21 January 2004.
URL: <http://www.icttr.org/ENGLISH/cases/Muhimana/decisions/210104.html>
18. *Norman et al.*, SCSL-2004-14-PT, "Prosecution Supplemental Pre-trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", 22 April 2004.
19. *Norman et al*, SCSL-04-14-T, "Motion for Service and Arraignment on Second Indictment", 20 September 2004.
20. *Prosecutor v Kovacevic* ICTY Appeals Chamber, IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998.
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Prosecutor v. Musema, ICTR-96-13-T, “Decision on the Prosecutor’s Request for Leave to Amend the Indictment”, 6 May 1999.



1999 WL 33268353 (UN ICT (Trial)(Rwa))

International Criminal Tribunal for Rwanda
Trial Chamber I

THE PROSECUTOR
v.

ALFRED MUSEMA

ICTR-96-13-T

Decision of: 6 May 1999

Original: English

DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO **AMEND** THE **INDICTMENT**

The Office of the Prosecutor: Ms Jane Anywar Adong, Mr. Charles Adeogun-Phillips,
Ms Holo Makwaia

Counsel for the Accused: Mr. Steven Kay QC, Prof. Michail Wladimiroff

Before: Presiding Judge Lennart Aspegren, Judge Laity Kama, Judge Navanethem
Pillay

Registry: Ms Marianne Ben Salimo

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal")

1. The Tribunal, sitting as Judge Lennart Aspegren, presiding, Judge Laity Kama, and Judge Navanethem Pillay has received from the Prosecutor a request for leave to file an amended indictment, dated 29 April 1999, in the case of """"The Prosecutor versus Alfred Musema"". The Defence filed a response thereto on 4 May 1999.

2. The submissions of the parties were heard on 5 May 1999.

The Submissions

The Prosecutor

3. The Prosecutor is seeking, inter alia:

(a) in terms of Rule 50 of the Tribunal's Rules of Procedure and Evidence (the "Rules"), to **amend** the **indictment** to add one new charge against the accused;

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(b) to expand upon the facts adduced in the existing indictment; and

(c) to amend count 7 of the indictment, as indicated in counts 8 and 9 of the proposed **amended indictment**.

4. The Prosecutor submitted that the proposed **amended indictment** reflects current jurisprudence by bringing it in line with jurisprudence of the Tribunal, viz the form of the indictment, and that it reflects the totality of the accused's alleged criminal conduct as presented by the evidence adduced **during trial** and as will be presented by anticipated witnesses. The Prosecutor cited extracts from witness testimony as well as witness statements in support of her submission that a prima facie case had been made in respect of the new charges. In support of her motion, the Prosecutor refers to the decision of the Tribunal granting leave to the Prosecutor to **amend the indictment** to admit the additional count of rape **during the trial** of 'The Prosecutor v. Jean-Paul Akayesu' (case no ICTR- 96-4-T).

5. It is argued by the Prosecutor that the amendment as sought is a mere technicality and therefore cannot be held to occasion prejudice or erode the rights of the Defence and will not fundamentally alter the on going trial against the accused, thus causing no additional delay to the trial. The Prosecutor contends that she had intimated at a status conference on 21 January 1999 that evidence of the alleged involvement of the accused in acts of sexual violence were uncovered in December 1998 and on that occasion she had indicated her intention to move for the amendment of the indictment against the accused, to include sexual offences. Subsequently, statements of the relevant witnesses were disclosed to the Defence on 25 January 1999. The Prosecutor submitted that the accused will therefore not suffer any prejudice, if the amendment to the indictment is granted, as he had been informed of these proposed charges, and the Defence has had ample opportunity to challenge the evidence presented by these witnesses.

6. The Prosecutor submitted that in the spirit of Rule 115 of the Rules, she should not be limited to any formalities and she added that where evidence relevant to the accused has come to light, which could contribute to justice being done, such evidence must be presented before the Trial Chamber.

7. In response to questions from the bench, pertaining to the delay in the filing of this motion for the amendment of the indictment, particularly in light of the fact that the relevant witness statements were disclosed to the Defence on 25 January 1999 and the motion for amendment was filed on 29 April 1999, the Prosecutor submitted inter alia that this delay was due to consultations being held among the various departments of the Office of the Prosecutor. These consultations, according to the Prosecutor, pertained to the investigation of the cases of sexual violence and further evaluation of the weight of the evidence and the credibility of these witnesses. Consultations were also held as to whether it would be prudent to file a motion to amend the indictment to include a separate charge of rape or alternatively to argue that these acts of sexual violence constitute acts of genocide, as charged in Count 1 of the indictment.

The Defence

8. In response, the Defence, on the basis of Rule 87 (B) of the Rules and Article 20 of the Statute of the Tribunal, submitted that the accused will only have to defend himself against acts as set out in a concise statement of facts culminating

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in charges as specified in the indictment against him. On the basis of the present indictment, the Defence argues that it has had no reason to conduct investigations or to prepare a defence for alleged but not indicted rapes.

9. On the same line, the Defence submitted that they should not be expected to act on the basis of the intention to amend the indictment as expressed by the Prosecutor during the status conference of 21 January 1999, but rather on allegations as specified in the indictment.

10. The Defence contends that the late filing of the motion is not justified, and that the Prosecutor has not shown any acceptable reason why the motion was not filed immediately after the taking of the witness statements. A further contention of the Defence is that the Trial Chamber is not empowered under the Rules to grant leave to amend the indictment, but rather that in terms of Rule 50 of the Rules this lies with the confirming judge.

11. In response to the Prosecutor's submission, the Defence submitted that Rule 115 of the Rules as cited by the Prosecutor is irrelevant to this case because this rule deals with issues arising at the level of appeal and not at the stage of trial. Referring to the Decision by the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, dated 15 October 1998, in the case of "Prosecutor versus Dusko Tadic'DD', the Defence submitted that there is a substantial difference between additional evidence and additional charges.

12. In conclusion, the Defence submitted that the evidence as presented at trial relevant to the allegation of rape, does not provide reasonable grounds for believing that the accused committed rapes and therefore the request to amend the indictment does not meet the required standard of proof to allow the Prosecutor to present new charges.

AFTER HAVING DELIBERATED,

The Tribunal states the following

13. The Tribunal has considered the submissions of the parties. In response to the Defence submission that it is the confirming judge and not the Trial Chamber who is empowered to order the amendment of the indictment, the Tribunal notes that Rule 50 of the Rules, clearly stipulates that 'At or after such initial appearance, an amendment of an indictment may only be made by leave granted by [a] Trial Chamber'. It is on the basis of this provision that the Trial Chamber is competent to entertain the motion and rule thereon.

14. The Tribunal notes that Rule 115 of the Rules, as cited by the Prosecutor is pertinent to matters arising at the level of appeal and not at the level of trial. Further, this rule, allows for the presentation of additional evidence at the level of appeal, but does not under any circumstances allow for additional charges to be brought against the accused. This rule is therefore irrelevant to these proceedings.

15. As a point of order, the Tribunal notes that the delay between the discovery of the pertinent statements in this instance and the filing of the motion cannot be justified on the grounds of the need for consultation between departments of

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the Office of the Prosecutor, and the technicalities of drafting the amended indictment. In the opinion of the Tribunal such grounds are not tenable when the issue pertains to the right of the accused to a fair and expeditious trial, and thus shall not be entertained by the Tribunal in the present matter.

16. As such, the Tribunal reiterates its criticism of the Prosecutor for failing to keep the Trial Chamber and the Defence informed of the development with regard to her motion to **amend** the **indictment** against the accused.

17. Notwithstanding the above, the Tribunal notes that Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file a request to **amend** the **indictment**, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.

18. The Tribunal is of the opinion that the filing of the motion, though coming at a late stage in the presentation of the Prosecutor's case, does not cause irreparable prejudice to the accused. Furthermore, the Tribunal is of the opinion that the amendments sought will not unduly delay the proceedings, considering firstly, that the Prosecutor has already disclosed all her witness statements supporting the additional allegations contained in the proposed amended indictment, and secondly, that all the witnesses she intended to rely on in respect of the proposed amendment, have already testified in this case.

19. The Tribunal has considered the evidence presented by the Prosecutor in support of her motion. On the basis of this, it finds that a prima facie case has been established by the Prosecutor with respect to the new counts and grants leave to file the **amended indictment**.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

GRANTS leave to the Prosecutor to **amend** the **indictment** by:

(i) adding one new charge against the accused as indicated in Count 7 of the proposed **amended indictment** of 29 April 1999;

(ii) expanding on the facts adduced in the existing indictment in support of the new charges, as indicated in paragraphs 4.7 to 4.11 of the proposed **amended indictment**; and

(iii) **amending** Count 7 of the present indictment against the accused, as indicated in Counts 8 and 9 of the proposed **amended indictment**.

REMINDS the Prosecutor of her obligation to immediately serve on the accused and his Counsel the **amended indictment** in English and in French.

Arusha, 6 May 1999.

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Signed on 24 May 1999.

Lennart Aspegren, Presiding Judge

Laïty Kama, Judge

Navanethem Pillay, Judge

Seal of the Tribunal

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