502) SCSL-04-15-T (18221 - 18232) 18221

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:
Hon. Justice Pierre Boutet, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Bankole Thompson

Registrar: **Mr. Lovemore Green Munlo**

Date filed: **2nd March 2006**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

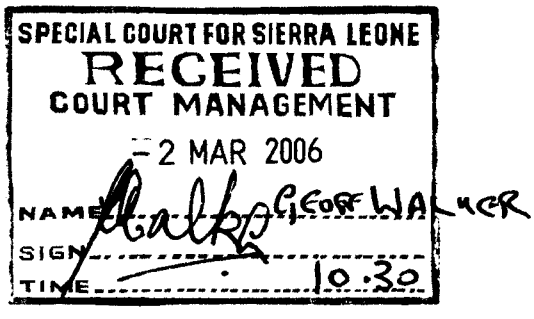
PUBLIC
DEFENCE RESPONSE TO PROSECUTION APPLICATION FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor

Desmond De Silva QC
Christopher Staker
James C Johnson

Defence

Wayne Jordash
Sareta Ashraph
Chantal Refahi



1. The Prosecution Motion (the "Motion") to amend the Amended Consolidated Indictment (the "Indictment") to expand the Kono crime base by 1 year and seven months, from its present limit of only 4½ months (as regards unlawful killings, physical violence, and looting and burning[1]) is demonstrably devoid of any merit whatsoever. It is based upon a wilfully misconceived interpretation of the jurisprudence and if granted, would amount to the addition of multiple "fresh allegations amounting either to separate charges or to new allegation in respect of an existing charge"[2] which would cause irreparable prejudice to the Accused. The grant of the amendment (both in its proposed extent and its timing) would be unprecedented in International law.

2. "It is a notorious fact that Prosecutors sometimes overload their Indictments and the Trial Chamber must be alert to prevent, "overcharging" which can lengthen trials beyond endurance. The Prosecutor has no duty to indict a defendant for every offence in respect of which there exists *prima facie* evidence against him. We emphasise this, because the Prosecution submissions verge on asserting such a duty. In fact, the overriding duty of a Prosecutor – what determines in fact, his or her professional ability – is to shape a trial by selecting just so many charges that can most readily be proved and which carry a penalty appropriate to the overall criminality of the Accused...In International Courts, where defendants may be accused of command responsibility for hundreds, if not thousands of war crimes at the end of a war that has lasted for years, the need to be selective in deciding which charges to include in a trial indictment is a test of Prosecution professionalism. In this respect, the Trial Chamber must oversee the Indictment, in the interests of producing a trial which is manageable".[3] In light of the Prosecution's ongoing and misguided attempt to prosecute the Accused for every crime in Sierra Leone since 1996 and their pursuit of this ill conceived application the Appeal Chamber's words are depressingly apposite.

Preliminary Objection

[1] Paragraphs 48, 62 and 80 of the Indictment, respectively.
[2] Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16 May 2005, Para. 79.
[3] Supra at Para. 82 Emphasis added.

3. The Defence submit that the Trial Chamber should summarily dismiss the application as lacking in proper or sufficient motivation. As noted in *Bizimungu*,[4] "Under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of its Motion and it is for the Defence to respond to these arguments".[5] The Prosecution in the Motion want the Trial Chamber to decide inter alia; that the proposed amendment would make the stated time periods consistent with the evidence before the Trial Chamber,[6] that in light of the evidence the amendments would ensure compliance with good practice,[7] that there would be no addition of allegations to the existing charges,[8] that there would be no prejudice to the Defence[9] and yet fail to provide either the Defence or the Trial Chamber with the evidence which is at the heart of the Motion. The Motion thus begs the question: what is the evidence which the Prosecution allege supports this present application?

4. This failure is intentional and must be designed to deprive the Accused and the Trial Chamber of a reasonable opportunity to assess the prejudicial ramifications of the proposed amendment. It is impossible to ascertain either the full extent of the prejudice which the Prosecution seeks to visit upon the Accused, without knowing which evidence forms the basis of the Motion. The test for permitting late amendments "is much more rigorous than a test of "interests of justice" and "lack of prejudice to defence" that applies at the pre-trial stage".[10] Notwithstanding this clear principle the Prosecution appears to consider that neither the Trial Chamber nor the Accused need to assess the evidence when considering its impact on the trial process and the Accused. It is thus impossible for the Accused or the Trial Chamber to comprehensively assess whether the Accused has been denied an opportunity to present his defence, whether it is alibi, lack of control on a given day, lack of *mens*

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[4] Case No. ICTR- 99-50-I Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003, Para. 28.
[5] See also Prosecutor v. Kordic and Cerkez, 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, Final paragraph.
[6] See the Motion, Para. 5.
[7] See the Motion, Para. 8.
[8] See the Motion, Para. 10.
[9] See the Motion, Para. 13.
[10] Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16th May 2005, Para. 77.

rea for a particular crime, mistaken identity, etc without knowing which factual allegations will constitute the expanded "Kono crime" base.[11] This type of nuanced analysis is required if the Accused rights are to be protected. It is thus self evident that Annex A (listing only a small proportion of the evidence which falls within the temporal jurisdiction of the proposed amendment) is not only insufficient for these purposes but ultimately misleading. The present motion lacks sufficient basis for a proper consideration of the issues therein and should be rejected without a consideration of its dubious merits.

Lack of Merit (on the face of the present application)

5. The Response will address the propositions which appear to form the thrust of the Prosecution Motion:

(a) The amendment would ensure conformity with the principle, expounded in *Dossi*[12] that the Prosecution need not prove an exact date of an offence where the date and time is not a material element of the offence[13]

(b) The purpose of the 1year 7 month proposed expansion is to "give the Defence better notice and particulars of the case that the Accused has to meet" and [14]

(c) The proposed amendment would not cause any unfair prejudice to the Accused[15]

The amendment would ensure conformity with the Dossi principle

6. There is no dispute that the *Dossi* principle is good law. However the Prosecution, when expounding at unnecessary length on the *existence* of this principle,[16] (understandably) avoid a review of its applicability to the facts in this case. As noted in all the authorities which the Prosecution purport to rely upon, the real issue when

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[11] As noted in *Liddy* [cited with approval in the Motion, Para. 7] there may be cases where "even though the particulars of when an offence is alleged to have been committed is not an element of the offence, it may be material to the integrity of the criminal process...the circumstances of the case, including the forensic issues raised at the trial such as alibi or lack of opportunity, may make the date vital"[R v. Liddy (2002) SASC 19 (31 January 2002) (SA CCA), pp. 69.] Moreover as noted in R v. B. (G), notwithstanding the rule in *Dossi* [*R v. Dossi*, 13 Cr. App.R. 158 (CCA), at pp. 159-160] the "individual circumstances of the particular case may... be such that greater precision as to time is required, for instance, if there is paucity of other factual information available with which to identify the transaction" [*R v. B. (G.)*, (1990) at footnote 12 of the Motion].

12 *R v Dossi*, 13 Cr. App. R. 158 (CCA). See prosecution footnote 2.

13 See the Motion, Para. 6 -8.

14 See Motion, Para. 8 – 11.

15 See Motion, Para. 12 – 14.

[16] See Motion, Para. 5-8.

considering whether the exact date is of importance to a particular offence, is whether the accused has been taken by "surprise"[17] or whether the Prosecution have given "reasonable information as the nature of the charge"[18] or whether "substantive fairness" has restricted the "capacity of the Prosecution to depart from particulars in a given case"[19].

7. In other words precision in the Indictment is essential albeit that "minor discrepancies"[20] which do not prejudice the accused are tolerated. In the case of *Rutaganda* hence a discrepancy of 2 weeks was allowed,[21] in the case of *Kunarac*[22] a pleading which alleged "on or around" the 16th July 1992 was approved and in the case of *Kayishema*[23] the time period under consideration was from the 9th April to the 30th June 1994. In every single case relied upon by the Prosecution in support of their application the difference in the pleading and the conviction was a matter of weeks – not months or years. It is disingenuous to pretend that any jurisprudence supports the proposed application which seeks to extend the Kono crime base jurisdiction by 1 year and 7 months and will allow for the addition of more than a hundred serious allegations of crime.

Amendment is to "give the Defence better notice and particulars of the case" [24]

8. This assertion is unreasonable to the point of being incomprehensible. It is difficult to understand how an assertion so lacking in commonsense could find its way into an application with such far reaching consequences for the trial process. It is absurd to suggest that by extending the temporal jurisdiction of the Kono crime base by 19

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[17] R v. JW[1999] EWCA Crim 1088 (21 April 1999) (CCA)
[18] R v. Lowe[1998] EWCA Crim 1204 (CCA), Last page
[19] R v Kenny Matter , CCA 60111/97 (29 August 1997) (NSW CCA). As also noted in the case of Liddy, an Accused, "is entitled to be appraised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge... there may be cases where even though the particulars of an offence is alleged to have been committed is not an element of the offence, it may be material to the integrity of the criminal process... the circumstances of the case, including the forensic issues raised at the trial such as alibi or lack of opportunity, may make the date vital" [R v. Liddy pp. 69].
[20] See Prosecutor v. Rutaganda ICTR-96-3-A, "Judgement" Appeals Chamber, 26 May 2003 para. 301 – 303.
[21] Supra. Para. 296 – 306.
[22] Para. 7 of the Motion - Prosecutor v. Kunarac para. 217
[23] Para. 7 of the Motion – Prosecutor v. Kayishema, para. 86.
[24] See Motion Para. 8 -11.

months, to allow for the additional prosecution of potentially hundreds or more factual allegations, each amounting to serious criminal conduct could conceivably be for the benefit of the Accused. At the very least the Prosecution ought not to ignore the principles and standards which have been clearly and concisely set out by the Appeals Chamber at the Special Court in the case of *Norman.*[25] In that case the Appeals Chamber emphasised that, "language should be given its ordinary meaning but they must be applied in their context and according to their purpose in progressing the relevant stage of the trial process fairly and effectively"[26] In other words an application to extend the temporal jurisdiction by 19 months is an application to extend the temporal jurisdiction by 19 months – nothing more and nothing less - with the consequence that the accused faces additional allegations contained in the amended time period.

9. This sensible rule of interpretation led the Appeal Chamber to define additional allegations of criminality as new charges"[27] and moreover to reject as "risible" the Prosecution suggestion that the addition of unlawful killings in 9 towns did not "add something new" to the *Norman* indictment[28]. Accordingly the suggestion made by the Prosecution in this case[29] that – the addition of potentially more than a hundred factual allegations, covering count 3-5, 10-11 and 14 in the proposed amended indictment, imposing multiple liabilities pursuant to Article 6(1) and 6(2) of the Statute, said to have been perpetrated in new towns and villages covering the length and breadth of Kono – does not add any new allegations to the present indictment is thus nothing less than risible.[30]

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[25] Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16th May 2005, Para. 80.
[26] Supra. Para. 46.
[27] Supra. Para. 85.
[28] Supra. Para. 86.
[29] Para. 10 of the application.
[30] The Prosecution application would create a whole series of either new charges or new allegations in respect of an existing charge [Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16th May 2005, Para. 79.] As noted in the case of *Halilovic* [Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17th December 2004, para. 30.] the key focus when considering whether the Prosecution have pleaded or are seeking to rely upon "new charges" is whether there exists a basis for conviction "that is factually and/or legally distinct from any already alleged in the indictment". This authority was followed in the case of *Prlic,* [Decision on Prosecution Application for Leave to Amend the Indictment and on Defence

10. In light of these considerations it is submitted that the Prosecution are seeking to add charges to this indictment. If leave was granted by Trial Chamber Rule 50(B) would be invoked. This would have the effect of further delaying the trial to allow for the procedural requirements to be fulfilled. Moreover, depending upon the nature and number of new charges[31] this delay could be exacerbated by the necessity to file new preliminary motions pursuant to Rule 50(B) (iii) and Rule 72. This would undoubtedly delay the Accused's trial which to date has imposed a three year detention on a man presumed to be innocent. It would breach the accused's right to be "tried without undue delay" (Article 17(4)(c) of the Statute) and ought not to be granted.

The proposed amendment would not cause any unfair prejudice to the Accused

11. As noted by the Appeals Chamber, substantive changes, which seek to add fresh allegations amounting to separate charges or to new allegation in respect of an existing charge; "will be carefully scrutinised and call for clear justification if they are to be allowed once the trial is underway. The prosecution must satisfy the court not only that the substantial amendments cause no prejudice to the defence but that they will not delay or interrupt the trial. Once a criminal trial has begun it should proceed with as little distraction as possible to its conclusion on the Indictment as opened by the Prosecution. In inquisitorial systems and civil trials there is more flexibility, but it is more fundamental to the adversarial system of criminal justice that once a trial is underway with live witnesses it should proceed without change of goal posts".[32]

Complaints on Form of Proposed Amended Indictment, Case No.IT-04-74-PT, 18th October 2005, para. 13.] which observed that the Chamber in *Halilovic* had carefully reviewed the law on the subject and was therefore good authority. The Chamber in *Prlic* noted that, "If a new allegation does not expose an Accused to an additional risk of conviction, then it can not be considered a new charge". In *Krnojelac* [Decision on Prosecutor's Response to Decision of 24th February 1999, 20 May 1999 ("Second Krnojelac Decision") at para.19.] the Trial Chamber remarks on this subject were particularly insightful. In an understated, but highly critical, Decision it refused to countenance the Prosecution's insistence upon an impossibly formal (and expedient) definition of charges which denied the Accused due process. The Trial Chamber observed that the presence or absence of new counts in the indictment did not determine whether the Prosecution had sought to add new charges.

[31] See Para. 3 – 5 Preliminary Objections.

[32] Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16th May 2005, Para. 80.

12. The Prosecution application is unprecedented. If granted it would expand the Kono crime base (arguably already the biggest crime base) in relation to Count 3-5, 10-11 and 14 to four times their present size to allow for the prosecution of a huge number of new factual allegations; many of which would attract many years of imprisonment if proven. The factual allegations contained in Annex A represent only a small minority of the allegations and yet together might well carry prison sentences into double figures. The idea that this expansion – sought two thirds of the way through the Prosecution case – at a time when 58 witness have been called – would not require a whole review of the Defence strategy, necessitating the recall of a huge number of witnesses to allow a specific case to be put to the witnesses on the newly relevant allegations is plainly wrong.

13. It is nonsensical and entirely circular to suggest that "all the witnesses were extensively cross-examined on the facts precisely because the evidence in question was in any case relevant to Counts 1 and 2, which incorporate all of the acts alleged in relation to all of the other counts"[33] when the acts alleged in all other counts do not (without this amendment) include unlawful killings, physical violence, looting or burning committed in Kono from 30th June 1998 to the 31st January 2000. In other words Count 1 and 2 do not presently include the proposed amendment. It is to be hoped that the minimal notice (of the particulars of crime in the indictment from paragraphs 45 – 82) can at least be relied upon to illustrate the fallaciousness of this curious proposition.

14. The fact that the Prosecution are constrained to rely upon the case of *Akayesu*[34] as the only example from the ad hoc tribunals as an example of an amendment during trial is instructive. The fact that they wilfully misread the case indicates everything about the merits of this application. The Appeal Chamber was considering the impact of the addition of only three counts of rape. The "three new counts related to the sites (Taba commune, in particular, the Bureau communal) and the material time (from April to end of June 1994), referred to in the initial indictment".[35] The fact that Counsel did

[33] See Para. 13 of the Motion.
[34] Prosecutor v. Akayesu, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001
[35] Supra. Para. 19.

not apply to recall witnesses whose prior statements did not deal with the new allegations, notwithstanding ample opportunity, was a factor in refusing the later complaint by the accused of unfairness in this regard[36]. This is a quite different proposition to the one suggested by the Prosecution[37] which implies that the Appeals Chamber considered that the recalling of the witnesses was unnecessary. Moreover the Prosecution fail to bring to the Chamber's attention that this relatively minor amendment (when compared to the present application) necessitated giving the accused a "4 month extension to prepare his defence adequately".[38]

15. In the case of *Akayesu* the Prosecution, mindful of its duty to the court and justice, felt obliged to explain the lateness of its application and thus sought to "remind "the Trial Chamber of the stages in its investigations and highlighted the particularly difficult security conditions prevailing in Rwanda at the time. Furthermore, the Prosecution filed sufficient material in support of its request. Consequently, the Trial Chamber properly granted leave to amend the indictment albeit belatedly".[39] In this case the Prosecution offer no reason to explain the delay except that, "there would have been little purpose in bringing it immediately after the evidence of the first witness to events in Kono District differed from the Indictment in terms of the timing of the events"[40] This remark – more than any sentence in any of the Prosecution's pleadings to date at the Special Court reveals the Prosecution's absolute disregard for the Accused's rights pursuant to Article 17 of the Statute and/or lack of understanding of the basic tenets of fairness in a criminal trial. The point of doing it at that early stage (that is one year ago)[41]would have been to identify with precision the case against the Accused to allow the defence the opportunity to challenge the evidence with this knowledge. The admission by the Prosecution that, not only have they intentionally delayed their application for one year, but they consider that it would have been pointless to make it earlier, is deeply depressing.

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[36] Supra. Para. 121.
[37] See Para. 13 of the Motion.
[38] Prosecutor v. Akayesu. Para. 122.
[39] Supra. Para. 120.
[40] See Para. 14 of the Motion.
[41] Witness TF1-304 gave evidence from the 11th to the 13th January 2005.

16. In the event that the application is granted the Defence will seek the recall of all the witnesses who make any factual allegations within the new time frame. The Defence have deliberately not pursued all its avenues for challenge given that it had notice that the evidence which was not proximate or did not fall within the time frame notified in the Indictment would not form part of the case against the Accused. In order to be able to implement an effective strategy to challenge the new evidence the Defence will require time to consider and prepare and investigate commensurate with the number of additional factual allegations. The fact that the Appeal Chamber in *Akayesu* regarded four months as a "reasonable"[42] adjournment to prepare for only three new allegations of rape (all falling within the time period particularised) perhaps offers the best guide to what would be a fair period to allow for effective preparation to deal with an amendment potentially involving in excess of a hundred of these types of allegations spanning 19 months outside the present temporal jurisdiction.

REQUEST

17. Accordingly it could never be anything but wholly unfair to allow the Prosecution to prosecute the trial *until two thirds of their case has been presented and the Accused have been in custody for three years*, having given notice that there would be no prosecution of alleged offences in Kono from 30th June 1998 (falling within Counts 3-5, 10-11 and 14) and then to allow them to change the goal posts by 17 months to allow the introduction of over one hundred more factual allegations of such crimes. It is difficult to envisage a worse example of trial by ambush. It involves the deliberate pursuit of an improper tactical advantage which brings the administration of justice into disrepute. The application ought to be rejected for the reasons set out herein.

Dated 2nd March 2006

Wayne Jordash
Sareta Ashraph
Chantal Refahi

[42] Prosecutor v. Akayesu, Para. 122.

Book of Authorities

Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16 May 2005

Prosecutor v Bizimungu, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, Case No.ICTR- 99-50-I, 6 October 2003 (readily available on ICTR website)

Prosecutor v. Kordic and Cerkez. Order on the Disclosure of Additional Information in respect of the Prosecutor's Motion for Leave to Amend the Indictment, 21 May 1998 (readily available on ICTY website)

R v. Liddy (2002) SASC 19 (31 January 2002) (SA CCA) (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/sa/SASC/2002/19.html?query=+%28%28liddy+29+and+%28on%29%29)

R v. B. (G.), [1990] 2 S.C.R. 30, 1990 CamLII 114 (S.C.C.) (http://www.canlii.org/ca/cas/scc/1990/1990scc59.html)

*R. v. B. (*G), [1990] 2 S.C.R. 57, 1990 Can LII 115 (S.C.C.) (http://www.canlii.org/ca/cas/scc/1990/1990scc60.html)

R v. Dossi, 13 Cr.App.R. 158 (CCA) (case attached to Prosecution motion)

R v. JW [1999] EWCA Crim 1088 (21 April 1999) (CCA) (http://ww.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Crim/1999/1088.html&query=jw&method=all)

R v. Lowe [1998] EWCA Crim 1204 (CCA) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Crim/1998/1204.html&query=1204&method=all)

R v Kenny Matter, No. CCA 60111/97 (29 August 1997) (NSW CCA) (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/unrep602.html?query=kenny+matter)

Prosecutor v. Rutaganda, ICTR-96-3-A, "Judgement" Appeals Chamber, 26 May 2003 (readily available on ICTR website)

Prosecutor v. Kunarac et al, IT-96-23&23/1-A, "Judgement", Appeals Chamber, 12 June 2002 (readily available on ICTY website)

Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, "Judgement and Sentence", 21 May 1999 (readily available on ICTR website)

Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16th May 2005

Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16th May 2005

Prosecutor v. Halilovic, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17th December 2004 (readily available on ICTY website)

Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Prosecutor's Response to Decision of 24th February 1999, 20 May 1999 (readily available on ICTY website)

Prosecutor v. Prlic, Case No.IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, 18th October 2005 (readily available on ICTY website)

Prosecutor v. Akayesu, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001 (readily available on ICTR website)