SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER

Before: Judge Benjamin Mutanga Itoe, Presiding
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 25 February 2005

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

SCSL-2004-14-T

RESPONSE OF THE SECOND ACCUSED TO URGENT PROSECUTION MOTION FOR RULING ON THE ADMISSIBILITY OF EVIDENCE

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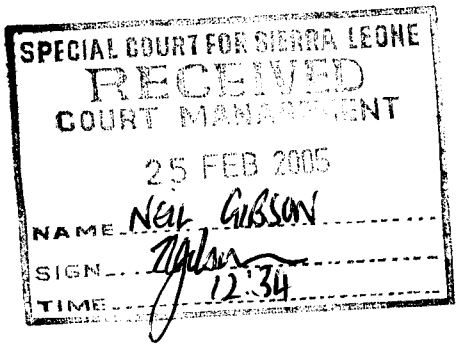

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INTRODUCTION

1. The defence for the Second Accused (the "Defence") hereby submits its response to the 'Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence' (the "Motion")[1].

2. The Prosecution seeks a ruling on the admissibility of certain proposed evidence pertaining to alleged 'gender crimes' against each of the three accused in light of the Trial Chamber's 'Decision of Prosecution Request for Leave to Amend the Indictment' (the "Amendment Decision")[2] in which it denied the Prosecution's request. Despite the Chamber's denial, the Prosecution submits that evidence which it intended to lead under the proposed amended counts, is "nevertheless admissible, concomitantly, under the existing counts"[3], namely Count Three (inhumane acts) and Count Four 4 (cruel treatment)[4].

3. Contrary to the Prosecution's assertions[5], the proposed evidence is neither relevant nor admissible. Indeed, the obvious consequence of the Amendment Decision is the exclusion of such evidence.

4. The Defence submits that (i) the proposed evidence is outside the scope of—and therefore, not relevant to—any existing count in the Indictment and (ii) the admission of such evidence would seriously prejudice the Defence by unduly delaying the proceedings. Accordingly, and for the reasons set forth below, the evidence should be excluded.

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[1] Document No. SCSL-04-14-T-341.
[2] 'Decision on Prosecution Request for Leave to Amend the Indictment' (the "Amendment Decision"), 20 May 2004, SCSL-2004-14-PT-113. Judge Boutet filed a separate dissenting opinion.
[3] 'Prosecution's Urgent Motion for a Ruling on the Admissibility of Evidence' (the "Motion"), 15 February 2005, SCSL-2004-14-T-341, at ¶ 6.
[4] Motion at ¶ 8.
[5] *Id.* at ¶ 1.

BACKGROUND

5. An Indictment was filed against the Second Accused on 24 June 2003. Subsequently, a Consolidated Indictment against the three Accused was filed on 4 February 2004.

6. Shortly thereafter, the Prosecution sought leave to amend the Consolidated Indictment to include four counts alleging various sexual offences[6]. The Chamber denied this application[7].

7. On 2 November 2004, the Prosecution attempted to lead evidence related to an alleged sexual offence. The Chamber sustained an objection made by counsel for the Third Accused and admonished the Prosecution to lead evidence related to allegations specifically pleaded in the Indictment[8].

8. On 16 February 2004, the Prosecution filed the instant Motion.

SUBMISSIONS

The Proposed Evidence is Irrelevant as it is Outside the Scope of the Indictment

9. The Prosecution seeks to lead evidence related to certain alleged sexual offences. However, such allegations were not pleaded with specificity in the Consolidated Indictment, and the Trial Chamber has denied the Prosecution's

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[6] 'Prosecution Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa' (the "Motion to Amend"), 9 February 2004, SCSL-2004-14-PT-005.

[7] Amendment Decision, n. 2, *supra*.

[8] Trial Transcript of 2 November 2004, at 51-54. In sustaining the objection, the Presiding Judge had this to say: "So you may proceed, because you know very well—you have the indictment before you, and you should not bring it in by the back door. Let me tell you very clearly, you should remember the particular circumstances in which you are leading evidence. You sought an amendment of this indictment where you wanted to add some sexual offences. This was refused. So you have to be very, very careful, because you will not bring evidence on matters which were refused to be joined in the indictment through the amendment you sought." *Id.* at 51:15-51:24. Judge Thompson added the following comment: "I associate myself with the learned Presiding Judge; that is precisely my point. We should stick to legality. There was no approval for the concept of forced marriage to be incorporated in this indictment, and until there is a higher authority overruling that, evidence to that effect would, in my respectful judgment, be inadmissible. *Id.* at 51:25-52:2. Judge Boutet subscribed to the majority decision. *Id.* at 54:28.

Motion to Amend. Accordingly, as such evidence is outside the scope of the existing indictment, it is irrelevant.

10. The SCSL Rules of Procedure and Evidence provide, in pertinent part:

> [A] Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. A Chamber may admit any relevant evidence[9].

11. The Defence agrees that the proper test to be applied in this case "is whether the evidence is relevant and admissible on the existing counts"[10]. It is generally accepted that evidence is relevant "if its effect is to make more or less probable the existence of any fact which is in issue"[11]. As the jurisprudence makes abundantly clear, a fact can only be considered "in issue" if it relates to allegations set forth specifically in the Indictment.

12. In *Kupreskic*, the accused were charged with persecution, including the deliberate and systematic killing of civilians[12]. At trial, the Prosecution brought evidence of a particular murder, the specifics of which had not been pleaded in the indictment. The Trial Chamber convicted two of the accused, finding that the murder was encompassed in the charge of persecution. However, the Appeals Chamber overturned the decision, finding the evidence outside the scope of the indictment[13]. Similarly, in *Kvocka*, the Trial Chamber excluded the evidence of a witness who testified that one of the accused had raped her because there was no mention of such allegation in the indictment[14].

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[9] SCSL Rules of Procedure & Evidence (the "Rules"), Rule 89(B) and (C).

[10] Motion at ¶ 36.

[11] Richard May and Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE ("ICE") at ¶ 4.23 (Transnational 2002) (*quoting* Richard May, CRIMINAL EVIDENCE at ¶ 1-13 (Sweet & Maxwell 1999)).

[12] *Prosecutor v. Kupreskic, et al.*, IT-95-16, 'Appeals Judgment', 23 October 2001.

[13] *Id.* at ¶ 92. ("There are, of course, instances, in criminal trials where the evidence turns out differently than expected. Such a situation may require...certain evidence to be excluded as not being within the scope of the indictment".)

[14] *Prosecutor v. Kvocka, et al.*, IT-98-30/1, Judgment, 2 November 2001. Although, in this case, the Chamber decided that the testimony would assist in establishing a consistent pattern of conduct pursuant to ICTY Rule 93, *Id.* at ¶ 556, this is manifestly not was the Prosecution intends to do with its proposed evidence here.

13. The above-mentioned jurisprudence is anchored in the generally accepted principle of law that guarantees an accused person the right to be told promptly of the charges against him in the indictment on which he was arrested[15]. This right—an essential aspect of the doctrine of equality of arms—ensures that the accused will have sufficient opportunity to prepare an adequate defence[16]:

> In the determination of any charge against the accused pursuant to the present statute, he or she shall be entitled to the following minimum guarantees, in full equality: To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her[17].

14. In order to give effect to this important right, the allegations of an Indictment must be set forth with a degree of specificity sufficient to place the accused person on notice of the particular charges against him:

> The Indictment shall contain, and be sufficient if it contains, ... 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[18].

15. The existing Indictment is devoid of any reference to allegations of a sexual nature. There is simply nothing within the four corners of the document that would put the Defence on notice of such charges as the Prosecution now seeks to advance. The Prosecution's failure to plead these allegations with specificity in the first instance precludes the evidence from being led under *any* count of the Indictment[19].

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[15] *See Prosecutor v. Kovacevic*, IT-97-24, 'Appeals Chamber Decision Stating Reasons for Appeal Chamber's Order of 29 May 1998', 2 July 1998, at ¶ 36.

[16] *See Prosecutor v. Barayagwiza*, ICTR-97-19-T, 'Appeals Chamber Decision', 3 November 1999, at ¶ 80.

[17] SCSL Statute, Article 17(4)(a). *See also Prosecutor v. Delalic et al (Celebici)*, IT-96-21-T, 'Judgment', 20 February 2001 at ¶ 348, where the Appeals Chamber noted that an indictment must make clear to the accused the "nature and cause of the charge against him".

[18] Rule 47(C) (emphasis added).

[19] That the proposed evidence "relates to the behaviour of members of the CDF, mainly Kamajors, during the relevant period of time covered in the Indictment", Motion at ¶ 15, is simply not enough to bring it within the confines of the Indictment. Furthermore, the example at ¶ 10 of the Motion is

16. Furthermore, the Prosecution's discussion as to why such "gender crimes" could fit within the ambit of the broader, well-defined violations of international humanitarian law is misplaced[20]. The Defence does not dispute that, as a general matter, "gender crimes" could be pleaded in *an indictment* as "inhumane acts" or "cruel treatment"—the jurisprudence is clear on this point. The Defence, rather, takes issue with the Prosecution's implicit assertion that such crimes have been pleaded in *this Indictment*[21]. In essence, the Prosecution contends that any time an indictment charges an accused with inhumane acts or cruel treatment, evidence of gender crimes can be lead regardless of whether or not the factual bases of such allegations have been specified[22].

17. As the first accused has pointed out, this is simply a clever attempt to amend the indictment by way of leading evidence[23]. However, the Motion to Amend has already been denied. Accordingly, it would be improper to allow the Prosecution to accomplish by an alternative method what this court has expressly forbidden.

18. Particularly troubling is the Prosecution's assertion "that the unlawful acts allegedly committed by the CDF, *although not specifically particularised in the Indictment*, are subsumed by the broad definitions pertaining to serious

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inapposite. Assuming, *arguendo*, that it is proper to lead evidence of a person being killed due to tribal membership absent a charge of Genocide, it would be so only because the Indictment specifically charges the Accused with "unlawfully killing" civilians and captured enemy combatants, thus fulfilling the requirement of placing the Accused on notice.

[20] Motion at ¶¶ 10-39.

[21] The fact that international tribunals have recognised that gender offences may fall under the rubric of "inhumane acts" and "cruel treatment", as a conceptual matter, does not vitiate the Prosecution's duty to draft a sufficiently specific indictment at the outset of its case.

[22] The Prosecution's characterisation of Article 3(a) of the SCSL Statute as being "residual" in nature, Motion at ¶ 21, in no way detracts from the established requirement that an indictment must be pleaded with specificity. N.B. In each case cited by the prosecution, the discrete factual aspects of the alleged sex crimes were specifically pleaded in the indictments. In *Akayesu*, the indictment specifically charged the accused with "sexual violence". *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 'Judgment', 2 September 1998 at ¶ 6 (Indictment ¶¶ 12A and 12B). In *Delalic*, the indictment specifically charged the accused with "forcing persons to commit fellatio with each other..." and "... repeated incidents of forcible sexual intercourse". *Prosecutor v. Delalic et al (Celebici)*, IT-96-21-T, 'Trial Judgment', 16 November 1998, at Annex B (Indictment ¶¶ 34 and 25).

[23] 'Response of First Accused to Urgent Prosecution Motion for Ruling on Admissibility of Evidence' (the "First Accused's Response"), 17 February 2005, SCSL-2004-14-PT-343, at ¶ 9.

bodily harm and serious mental harm. Such terms encompass the extensive range of consequences and injuries suffered by the witness"[24]. This assertion seems to dismiss, as somehow quaint or trivial, the fundamental requirement that an accused be sufficiently apprised of the nature of the charges against him, as mandated by the Statute and Rules of this Court, as well as general principles of law. As rightly pointed out by the First Accused, accepting the Prosecution's formulation would lead us down a very slippery slope, indeed[25]. It is submitted that the rights of the accused, and not the "practical" dilemmas facing the Office of the Prosecutor[26], are of paramount concern in a criminal trial.

19. For the reasons stated above, the proposed evidence should not be admitted, and any evidence led in court under Count Three or Four must be limited to those alleged acts pleaded with specificity in the Consolidated Indictment[27].

The Presentation of the Proposed Evidence Would Prejudice the Defence by Unduly Delaying the Proceedings

20. Assuming, *arguendo*, that the Chamber were to admit the proposed evidence, the Defence submits that to do so would unduly delay the proceedings to the detriment of the Second Accused's right to be tried without undue delay[28].

21. The Prosecution contends that to lead the proposed evidence would "not cause any delay in the trial as the subject material has been disclosed, in some form for over 12 months"[29]. This contention is simply untrue. Contrary to the Prosecution's submission[30], the Defence most certainly did not expect nor

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[24] Motion at ¶ 30 (emphasis added).

[25] First Accused's Response at ¶ 10.

[26] Motion at ¶ 31. ("It is not practical to include, within the particulars, all the factual variations of unlawful acts that could lead to serious bodily harm and serious mental harm".)

[27] *Viz.*, "screening for 'Collaborators', unlawfully killing of suspected 'Collaborators', often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of 'Collaborators', the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot". Consolidated Indictment, 4 February 2004, at ¶ 26(b).

[28] As acknowledged by Judge Boutet, "The specific guarantee against undue delay is one of several guarantees that makeup the general requirement of a fair hearing". Amendment Decision, Dissenting Opinion, at ¶ 11.

[29] Motion at ¶ 33.

[30] *Id.* at ¶ 33.

anticipate the presentation of evidence outside the scope of the Consolidated Indictment.

22. Since its inception, the Defence investigation has been operating under the reasonable assumption that no evidence of the type proposed in the Motion would be presented, as no allegations of gender offences were pleaded in the Consolidated Indictment. Any ambiguity on this point was definitively laid to rest by the Trial Chamber's denial of the Motion to Amend.

23. As the Chamber is well aware, Defence teams operate on extremely limited budgets, and resources in terms of manpower are similarly scarce. To properly cross-examine witnesses on the proposed evidence would require an adjournment not only to properly train our investigator in the very sensitive matter of sex crimes investigation[31], but to then re-conduct investigations on those matters that were—for good reason—not addressed during our initial investigations.

24. It is submitted that if the Motion were granted, the Chamber would be obligated to afford the Defence such adjournment[32], which—at this late stage of the proceedings—would amount to undue delay. As the Chamber pointed out in the Amendment Decision:

> It would, we do observe, certainly take some length of time for the Defence to accomplish these legitimate investigations. This, to our mind, would occasion an 'undue delay' in proceeding with the trial and ensuring that it is 'fair and expeditious', factors which would occasion an breach of the rights of the accused persons under Article 17(4) of the Statute if the amendment were granted[33].

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[31] N.B. This is an advantage mandated by statute to Prosecution investigators. SCSL Statute, Article 15(4).

[32] *See* SCSL Statute, Article 17(4)(b). An essential element of a fair trial is that the defence must have adequate time to prepare their case. ICE, n. 11 *supra*, at ¶ 8.29 (citing ICTY Statute Art. 21(4)(b), ICTR Statute Art. 20(4)(b), and ICC Statute Art. 67(1)(b)).

[33] Amendment Decision at ¶ 63.

25. The Prosecution should have sought any clarification immediately following the Amendment Decision of 20 May 2004 or, at the very latest, after the Prosecution was precluded from leading such evidence in court during the third trial session[34]. We are fast approaching the end of the Prosecution's case, which has proceeded thus far on the implicit understanding that no evidence of gender offences would be led. Granting the Motion at this late stage of the proceedings would truly prejudice the Defence.

CONCLUSION

26. For the reasons stated above, the Defence submits that the Motion must be denied.

COUNSEL FOR MOININA FOFANA

Victor Koppe

[34] *See* n. 8, *supra.*

DEFENCE LIST OF AUTHORITIES

1. Statute of the Special Court for Sierra Leone, Articles 15(4), 17(4)(a), and 17(4)(b)

2. SCSL Rules of Procedure & Evidence, Rules 47(C), 89(B), and 89(C)

3. 'Decision on Prosecution Request for Leave to Amend the Indictment', 20 May 2004, Document No. SCSL-2004-14-PT-113

4. *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 'Judgment', 2 September 1998

5. *Prosecutor v. Barayagwiza*, ICTR-97-19-T, 'Appeals Chamber Decision', 3 November 1999

6. *Prosecutor v. Delalic et al (Celebici)*, IT-96-21-T, 'Trial Chamber Judgment', 16 November 1998

7. *Prosecutor v. Delalic et al (Celebici)*, IT-96-21-T, 'Appeals Chamber Judgment', 20 February 2001 at ¶ 348

8. *Prosecutor v. Kovacevic*, IT-97-24, 'Appeals Chamber Decision Stating Reasons for Appeal Chamber's Order of 29 May 1998', 2 July 1998

9. *Prosecutor v. Kupreskic, et al.*, IT-95-16, 'Appeals Judgment', 23 October 2001

10. *Prosecutor v. Kvocka, et al.*, IT-98-30/1, 'Judgment', 2 November 2001

11. Richard May and Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE (Transnational 2002)