SCSL-2004-16-PT
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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 6 May 2004

PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-PT)

DECISION ON PROSECUTION REQUEST FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:

Luc Côté
Robert Petit

Defence Counsel for Alex Tamba Brima:

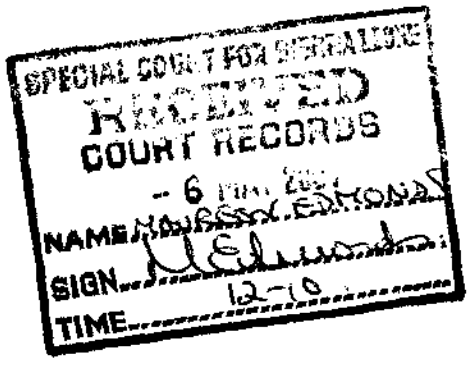
Terence Terry

Defence Counsel for Brima Bazzy Kamara:

Ken Fleming

Defence Counsel for Santigie Borbor Kanu:

Geert-Jan Alexander Knoops



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THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Judge Bankole Thompson, Presiding Judge, Judge Benjamin Mutanga Itoe and Judge Pierre Boutet;

SEIZED of the Prosecution Request for Leave to Amend the Indictment filed on 9 February 2004 ("Motion") pursuant to Rules 50(A) and 73(A) of the Rules of Procedure and Evidence of the Special Court ("Rules"); the Response thereto, filed by Defence for Santigie Borbor Kanu on 17 February ("Kanu Response")[1]; and the Prosecution Reply thereto filed on 20 February 2004[2];

CONSIDERING the Order to Submit Indication of Specific Changes to Indictments served on 26 February 2004; and also the Indication of Specific Changes to the Indictments filed by the Prosecution on 1 March 2004;

CONSIDERING ALSO the oral submissions proffered on this matter in the course of the Status Conference held on 8 March 2004;

NOTING THE SUBMISSIONS OF THE PARTIES

THIS IS OUR RULING ON THIS MOTION

RESUME OF THE FACTS

1. The facts, briefly stated, are that following the provisions of the Rules 50(A) and 73(A) of the Rules of Procedure and Evidence, the Prosecution is seeking our leave to amend the Indictment against the AFRC group of indictees, namely, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, all of who stand indicted and detained for war crimes, crimes against humanity and offences against international humanitarian law which fall within the jurisdiction of the Special Court pursuant to Articles 2, 3 and 4 of the Statute of the Special Court.

2. The initial indictments, in which the 3 accused were arraigned and pleaded "Not Guilty" respectively on 17 March 2003, for Alex Tamba Brima, 4 June 2003, for the Accused Brima Bazzy Kamara, and on 23 September 2003, for the Accused Santigie Borbor Kanu, were individual indictments that were approved by His Lordship, Judge Bankole Thompson on 7 March 2003 for

[1] *The Prosecutor v. Santigie Borbor Kanu*, "Response to Prosecution's Request for Leave to Amend the Indictment", 17 February 2004.
[2] SCSL-2004-16-PT, Reply to Defence Response to Prosecution Request for Leave to Amend the Indictment, 20 February 2004.

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the Accused Alex Tamba Brima and on 28 May 2003 for the Accused Brima Bazzy Kamara and by His Lordship, Judge Pierre Boutet on 16 September 2003 for the Accused Santigie Borbor Kanu.

3. On 9 October 2003, the Prosecution made an application to the Chamber to seek a consolidation of all the indictments to 2 only instead of proceeding on the individual indictments. It sought to join the 3 RUF and the 3 AFRC indictees in one consolidated indictment, and the 3 CDF indictees in the other consolidated indictment.

4. After an exchange of lengthy written, followed by oral submissions by the Parties in an open Court hearing, the Chamber, in order to avoid a conflict in the conduct of the defence between the RUF and the AFRC group, instead decided to consolidate all the indictments into 3 sets; one consolidated indictment for the RUF group of indictees, namely Issa Hassan Sesay, Morris Kallon and Augustine Gbao, and the other for the AFRC group of indictees, namely, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu. Finally, one consolidated indictment was approved for the CDF group of indictees, namely, Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa.

5. The Motion before us now therefore, is in fact and in effect the 3rd in the series of indictments in their varied formulations and wordings which the Prosecution intends to file after we would have granted the amendment and this, before their trial which Prosecution knows is imminent.

6. In seeking these amendments, the Prosecution is relying on the provisions of Rule 50 of the Rules of Procedure and Evidence, in order to add one more and new count of forced marriage on the already consolidated indictment.

7. In making this application, the Prosecution argues that the amendment will not prejudice the rights of the accused in that it is timely, will not unduly delay the trial of the accused, and also that the amendment sought is in the interests of justice.

For the Prosecution

8. The Prosecution seeks to add one new count, namely "Crimes against humanity – other inhumane acts (forced marriage)". Additionally, the Prosecution seeks to make "corrections and/or modifications" to other counts which include the expansion of time periods, an additional location for all counts related to sexual violence crimes, and the change of spellings of certain place names.

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9. The Prosecution alleges that the new count is based on the same factual allegations as the other counts related to sexual violence charges and will not require further disclosure. According to the Prosecution, this is required to represent the totality of the criminal conduct of the Accused. The Prosecution further states that it did not bring the Motion prior to the joinder decision "in the interest of judicial economy" so that it could avoid filing motions in each case.

10. The Prosecution included a two-page "Investigator's Statement" with the Motion. The investigator states that he has found that the crimes of sexual violence are not simply sexual slavery but are most appropriately characterised as "forced marriages". He states that new investigations have "clarified" the nature of the relationships.

The Response:

11. The Defence Team for Santigie Borbor Kanu has filed a response objecting to all new charges except the spelling of the places and names.

12. As far as the offence of forced marriage is concerned, it argues that it was not a crime against humanity and that bringing such a charge violates the principle of legality. The Defence contests the form of the indictment and argues that the rights of the Accused have been violated because of the failure by the Prosecution to disclose the new charge promptly on his arrest.

13. Furthermore, that the extension of the charges by one and a half years prejudices the rights of the Accused and is untimely and that the defence is now limited in its investigative possibilities given the proximity to the trial.

14. We note that Counsel for Alex Tamba Brima and Brima Bazzy Kamara filed no responses to the Prosecution's Motion.

The Reply:

15. The Prosecution asserts that "other inhumane acts" is a residual category, that an exhaustive list as to what it encompasses is impossible and thus that it is irrelevant that the act of "forced marriage" is nowhere mentioned in existing lists. The Prosecution emphasises that the additional count is that of "other inhumane acts" and not "forced marriage". According to the Prosecution, "other inhumane acts" is clearly defined, thereby complying with the principle of specificity, and is evaluated by the evidence based upon the criteria of gravity and infliction of

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severe physical and mental injury. Also according to the Prosecution, in the context of international tribunals the speciality principle only applies to extradition situations.

16. At the Status Conference on the 8 March 2004, the Chamber put a number of questions to the Prosecution on this matter, which questions the Prosecution responded to orally. On being asked why the Prosecution waited so many months after the original indictments were approved before seeking amendment to include the charge of forced marriage, the Prosecution repeated merely that they were awaiting the decision on joinder. The Prosecution asserted that no advance notice was required in relation to the new charge. According to the Prosecution, forced marriage differs from sexual slavery combined with forced labour and is therefore not duplicitous in that forced marriage entails a conduct over time whereby a man forces a woman into a relationship with all the trappings of marriage, and in which, in the Prosecution's submission, there are obligations in relation to the division of chores and sexual relations as in a marriage. In relation to the insertion of the word "about", the Prosecution declined to give a specific time-period that such a term would cover, supported the request by submitting that witnesses could rarely identify precise dates, and observed that the Trial Chamber had previously held such a term lawful. On being asked to give a date as to when the Prosecution discovered evidence to support the expanded time-frame by one and a half years in paragraph 68 of the amended indictment, the Prosecution answered that the extent of the offences was only discovered once insiders began to disclose information, which was after the original indictment. No time-period any more specific than this was given. In relation to the expansion of the indictment to include the Port Loko District location, the Prosecution submitted that evidence as to this location was only discovered after the confirmation of the original indictments for investigators had not been working in that area before that time. Evidence supporting this was disclosed to the Defence in the last two batches of disclosure.

17. The Chamber offered Defence Counsel the opportunity to respond to these submissions, and Counsel for all three Accused declined that opportunity.

DELIBERATIONS

18. After this overview of the facts, we would now proceed to examine the legal basis of the issues raised vis-à-vis the jurisprudence cited by the parties to buttress their arguments. At the outset, we note that the submissions made by the Kanu Defence in relation to defects in the form of

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the indictment can only be brought pursuant to Rule 72(B)(ii) and therefore have no place at this stage of the process.

19. Rule 50 under which the application was brought reads as follows:

"(A) The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it, but in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by the Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 52 apply to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The Accused shall have a further period of fourteen days from the date of initial appearance on the new charges in which to file preliminary motions relating to the new charges."

20. During the Plenary Meeting of the Judges of the Court in Freetown on the 11th of March, 2004, Rule 50 was amended to read as follows:

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, 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 Rule 52 apply to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:

(i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;

(ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;

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(iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges."

21. The other relevant provisions of the law are Articles 17(4) of the Statute of the Special Court which stipulates as follows:

"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:

(a) 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;

(b) To have adequate time and facilities for the preparation of his or her defence;

(c) To be tried without undue delay"

22. Furthermore, Article 9(2) of the International Convention for the Protection of Civil Rights stipulates as follows:

"Anyone who is arrested shall be informed at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

Article 14(a), and 14(b) and 14(c) of the ICPCR are similar to and are reproduced in the relevant articles of Article 17 of the Statute.

23. The Chamber recalls that the provisions of Rule 50 of the Rules of Procedure and Evidence of the Special Court are textually the same as those of Rule 50(A), (B), (C) of The Rules of Evidence and Procedure of the International Criminal Tribunal for Rwanda (ICTR).

24. It is important to note here that the power conferred on the Court to grant an amendment is discretionary and that it should be exercised judiciously and in the overall interests of justice.

ANALYSIS

25. We would like to observe here that what at times justifies applications to amend charges as in this case, stems from drafting imperatives of criminal law, where for every offence alleged and supported by the available evidence, there must be a separate and distinct count

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26. Following this practice, it is the traditional role and practice of the prosecution to bring as many counts in an indictment as possible and although it does impose on him the obligation to bring all the charges that are borne out by the evidence, nothing prevents or prohibits him either from preferring and bringing all the charges which he thinks are supported by the evidence at his disposal, not only with a view to a proper determination of the case, but also and above all, to serve the overall interests of justice.

EQUALITY OF ARMS

27. The crucial consideration in this process, in our opinion, is one of timing. The question to be asked, is whether application for the amendment is brought at a stage in the proceedings where it would not prejudice the rights of the defence to a fair and expeditious trial and furthermore, whether it is made in the overall interest of justice rather than its having the effect of giving an undue advantage to the prosecution, thereby putting in jeopardy, the doctrine of equality of arms between the Prosecution and the Defence.

28. We recall here that in the Tadic case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) took the view that "Equality of arms" obligates a judicial body to ensure that neither party is put to a disadvantage when presenting its case..

BURDEN OF PROOF

29. We appreciate that the burden of proof that the Prosecution bears in every criminal trial is understandably very heavy. It commences with the detection and production of solid and convincing evidence to establish the guilt of the accused beyond all reasonable doubts. The other important component of the burden of proof is the charge or charges which the Prosecution files in order to reflect the evidence it has at its disposal and can adduce in order to discharge the obligation of "proof beyond all reasonable doubt".

30. We would like to acknowledge here, the fact that this burden of proof is even more demanding in matters before the international criminal tribunals than it is in the municipal systems. The reason is that the protection of the rights of suspects and accused persons is not only often more clearly spelt out and entrenched in the statutes of those tribunals, but is also, in addition, reinforced by other international conventions and instruments that are conspicuously absent in municipal legislations.

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31. To attain these objectives, we think that the Prosecution must and indeed, should be given the latitude, to resort to all means that the law permits to enable it to fully exercise its authority under the Statute and under the general and accepted principles of law and practice in the domain under review, and this, with a view to giving it the opportunity to fully assume and discharge those prosecutorial functions.

AUTONOMY OF THE PROSECUTOR

32. The Statute of the Special Court in its Article 15(1) stipulates inter alia that the Prosecutor shall act independently as a separate organ of the Special Court. "He or she shall not seek or receive instructions from any government or from any other source."

33. Article 15(4), still of the Statute, inter alia, stipulates as follows:

> " ...Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape and sexual assault, abductions and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of the prosecutors and investigators experienced in gender-related crimes and juvenile justice."

34. These provisions underscore the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offences with a view to bringing the alleged perpetrators to justice. In the light of the above, it is expected, and we hold the view, that the Prosecutor who is at the helm of the investigation process, should exercise vigilance, diligence and attention, bring before justice for trial, all those accused of having committed gender and other categories of offences within the competence of the Court without any "undue delay", as stipulated in Article 17(4)(c) of the Statute of the Court.

35. Our duty in situations of this nature where statutory interests are in conflict is to ensure a rigorous respect of the rights of each of the parties in the arena, and to ensure that there is no breach of one's or the other's rights.

EXTENT OF THE AMENDMENT SOUGHT BY THE PROSECUTION

36. The Prosecution in its submissions in this case explains that the purpose of this motion to amend the indictment is to enable it to add to it, "a new charge" of crimes against humanity – Other Inhumane Act (forced marriages), as a new count in the Consolidated Indictment. This

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count, the Prosecution explains, will become the 8th and the previous counts namely, 8 through 17, will continue sequentially from counts 9 through 18.

37. The Prosecution argues that the amendment is justified both in law and on the evidence and should be granted because:

(a) It better reflects the full culpability of the Accused;

(b) There has been no undue delay in bringing the amendment; and

(c) The filing of the Amended indictment will not prejudice the rights of the accused to a fair and expeditious trial.

38. The Prosecution further argues that all material have been disclosed to the Defence and that the "additional count" is based on the "exact same factual context" as the other charges in relation to sexual violence and forced labour and that no further investigations should be required since the "bush wife phenomenon" is mentioned in numerous witness statements.

39. The other components of the amendment include:

(a) A modification of the date in the particulars of counts 3-5;

(b) The modification of the time period in paragraph 71;

(c) The modification of time periods in paragraph 23 to reflect the death of FODAY SANKOH;

(d) The addition of new spellings

40. A careful examining of all the indictments that the Prosecution has preferred against this group of indictees from the onset of this process reveals the following:

41. The original individual indictments against the 3 accused persons which were approved on the 7th March 2003 for the Accused Alex Tamba Brima and on 28 May 2003 for the Accused Brima Bazzy Kamara and by His Lordship, Judge Pierre Boutet on 16 September 2003 for the Accused Santigie Borbor Kanu, alleged sexual violence in counts 6-8. More precisely, count 6 charged each of them with Rape, Count 7 with sexual slavery and other forms of sexual violence, and finally, count 8 which alleges the crime of outrage against personal dignity.

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42. These same charges and counts were textually reproduced in the same form in the Consolidated Indictments. In this motion for an amendment, the Prosecution maintains that the Counts are as they always have been from the original Individual Indictments to the Consolidated Indictment and that it is only seeking the leave of the Court to add a similar offence to those that have consistently, as we have observed, appeared all along in previous indictments.

43. It is in the light of the above that the Prosecution argues that the amendment is based on existing allegations in the current consolidated indictment as well as in the evidence already disclosed to the Defence and that consequently, granting the amendment will not result in an undue delay in trying the accused persons.

44. We would like in this regard, to refer to the case of the PROSECUTION VS KAREMERA ICTR-98-44-AR73 in which the Appeals Chamber of the ICTR held that in assessing whether a delay resulting from an amendment to an indictment will be "undue", the tribunal must consider factors such as the diligence of the Prosecution in advancing the case and the timeliness of the request. In that case, the Appeals Chamber had this to say:

> "Although amending an indictment frequently causes delay in a short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings, by narrowing the scope of the allegations, by improving the Accused's and the Tribunals understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at the trial."

45. In the case of THE PROSECUTION VS CASIMIR BIZIMUNGU & OTHERS CASE NO ICTR-99-50-AR50, 12 February 2004, the Appeals Chamber of the ICTR had this comment to make in disallowing the Prosecutions Appeal against a refusal by the Trial Chamber to grant a motion for an amendment of the indictment and I quote;

> "...amendments that narrow the indictment and thereby increase the fairness and efficiency of proceedings should be encouraged and usually accepted...Had the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial..." (at paragraphs 19-20).

46. The crucial consideration in this process, in our opinion, is one of timing and whether the application for the amendment is brought at the stage in the proceedings where it would not prejudice the rights of the accused to a fair an expeditious trial and furthermore, whether it is

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made in the overall interests of justice rather than having the effect of giving an undue advantage to the prosecution, thereby putting in jeopardy, the doctrine of 'equality of arms' between the Prosecution and the Defence.

47. What, however, is desirable and should be ensured is for the Prosecution, in the exercise of its duties as a separate organ under the Statute, to enjoy at certain acceptable stages of the proceedings, a free hand in executing its duties and obligations to the Court and this, before the heavy hammer of justice comes down to decide on whether it is still enduring with the weight of the irksome burden of proof that it carries all along, or whether it has discharged it and indeed, beyond any reasonable doubt. In making this observation however, we do not lose sight of the fact that the Prosecution in so acting, must do so within the confines of the law and by respecting, not only the legal protection accorded to the accused by the Statute, but also, the principle of a fair and expeditious trial within the context of course, of the doctrine of equality of arms between the Prosecution and the Defence.

48. In this Motion, we find that the Prosecution, during the investigations that preceded the initial appearances of the accused persons, properly addressed their minds to gender offences and the necessity to gather the required evidence to have their perpetrators prosecuted. To ensure that this happens the Prosecution, during the investigations that preceded initial appearances, detected gender offences. In drawing up hereafter the initial individual indictments of the accused which were approved on the 7th of March, 2003, and on which initial appearances were based, the Prosecution ensured that these individual indictments contained a number of counts related to gender offences such as rape, sexual slavery and other forms of sexual violence and finally outrages against personal dignity.

49. Furthermore, in the consolidated indictment which was approved by the Trial Chamber following a motion filed to this effect, the Prosecution again included all these enumerated gender offences which featured in the initial individual indictments.

50. In the present motion, the Prosecution is seeking our leave to amend the already existing consolidated indictment on which the proceedings are now based, in order to add one count, and one count only, based on Forced Marriage. The question to be addressed in these circumstances is whether this additional count or offence as the case is, is new in terms of its being a complete novelty in the arsenal of all the counts that constitute the entire consolidated indictment.

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51. Our immediate reflection on this issue that we have raised is that the count related to forced marriage which the prosecution is seeking our leave to add to the consolidated indictment is as much a sexual, indeed, a gender offence as those that were included in the initial individual indictments and that feature in the current consolidated indictment on which this application to amend is based.

52. We would like to say here that Forced Marriage is in fact what we would like to classify, as a 'kindred offence' to those that exist in the consolidated indictment in the view of the commonality of the ingredients needed to prove offences of this nature. Given this consideration and the fact that material related to those gender offences that feature on the consolidated indictment has long been disclosed to the Defence, we are of the opinion that the amendment sought is not a novelty that should necessitate fresh investigations as the defence contends. This is only logical because granting it would neither occasion an "undue delay" of the trial of the accused, nor a breach of the statutory rights of the accused as provided for under the provisions of Article 17(4)(a) of the Statute and also because it would not consequently as well, either place the prosecution in an unduly advantageous position to the detriment of the defence, nor would it violate the principle of "equality of arms".

53. In the particular context of this case, we accept the Prosecution's argument that this application to amend, for the reasons that the offences sought to be added were disclosed to the accused and the Defence promptly, fulfils the criterion of timeliness having been filed even before the trial proceedings take off although we know that some applications for amendments could, and have in fact been accepted, at the depth of the trial for considerations based on the overall interest of justice.

54. In this regard, and to underscore the fulfillment of the criterion of timeliness, an examination of some municipal decisions which are in line with the philosophy of the evolving jurisprudence in international criminal justice as far as the amendment of charges is concerned and at what stage such applications could be entertained, are quite instructive and illuminating.

55. In the case of AYANSHINA VS. POLICE (1951), 12 WACA 260, the then West African Court of Appeal held that it was permissible to add a fresh count after a submission had been made that there was no case to answer on the original charge and before a ruling in favour of the submission had been given. In another case, R. V KANO & ARISAH (1951) 20 NLR, 32,

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a decision of the Supreme Court of Nigeria which was upheld, still by the then West African Court of Appeal, it was held permissible to amend a charge after the final addresses and before judgment was delivered provided, as the Court observed, the "alteration could be made at that stage without injustice to the accused". Indeed this decision is very reflective of the provisions of Section 148(1) of the Criminal Procedure Act of Sierra Leone which provides in effect that such applications for amendments of charges 'unless having regard to the merits of the case, the requested amendments cannot be made without injustice".

56. It might be difficult today to accept the applicability of the scope of these decisions in International Criminal Tribunals but they serve to emphasise the variables of the concept of timeliness in introducing an amendment and the ideal timeliness and promptitude that characterized the Prosecution's action in this matter, and to underscore the flexibility of the exercise of the judicial discretion in granting or refusing a motion to amend while emphasising that the same essential ingredients would necessarily include an examination on a case to case basis and the respect at all times, for the overall interests of justice.

57. In light of the above, we would like in our reasoning in this matter, to refer to the case of THE PROSECUTOR V ALFRED MUSEMA, ICTR-96-13-T, 6 May 1999, where, like in the instant case, the application to amend consisted of adding only one count and to expand on the facts in the existing indictment. In the Musema case, the amendment was granted on the grounds that it was a mere technicality which the Trial Chamber considered would not, if granted, be prejudicial to the statutory rights of the Accused.

58. We are therefore of the opinion that the Prosecution has satisfied these criteria. We accordingly allow the Prosecution's motion to amend the Consolidated Indictment and order as follows:

(i) That the inclusion in the Consolidated Indictment of a new count 8 of "Other Inhumane Act, a crime against humanity, punishable under Article 2.i of the Statute", as well as the other amendments requested by the Prosecution, is hereby granted in the form contained in the Proposed Amended Indictment filed as Annex 1 to the Motion on 9 February 2004;

(ii) That these amendments shall go forward in compliance with the provisions of Rules 50(A) and (B)(i) of the Rules.

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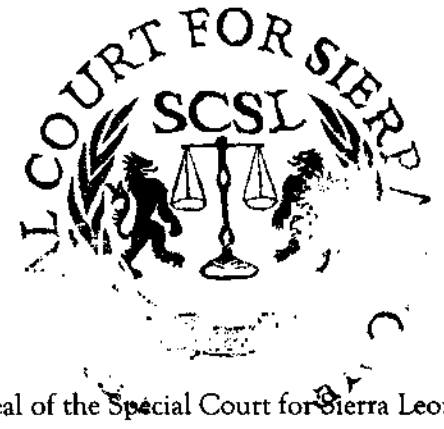
Done at Freetown this 6th day of May 2004

Judge Benjamin Mutanga Itoe

Judge Pierre Boutet



[Seal of the Special Court for Sierra Leone]

Judge Bankole Thompson appends a separate and dissenting opinion to the Decision of the Trial Chamber.

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 6 May 2004

PROSECUTOR Against Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-PT)

DISSENTING OPINION OF JUDGE BANKOLE THOMPSON, PRESIDING JUDGE OF THE TRIAL CHAMBER ON PROSECUTION'S MOTION FOR LEAVE TO AMEND INDICTMENT AGAINST ACCUSED ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA AND SANTIGIE BORBOR KANU

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Defence Counsel for Brima Bazzy Kamara:
Ken Fleming

Defence Counsel for Santigie Borbor Kanu
Geert-Jan Alexander Knoops

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DISSENTING OPINION OF JUDGE BANKOLE THOMPSON:

INTRODUCTION

1. My learned brothers, his Honour Judge Benjamin Mutanga Itoe, and his Honour Judge Pierre Boutet have, by a majority, decided to grant leave to the prosecution to amend the Consolidated Indictment against Accused Issa Hassan Sesay, Morris Kallon, and Augustine Gbao. Unquestionably, this Decision was reached after very careful and constructive deliberations on their part. Despite their learned and erudite analyses of the issues germane to such an application, I respectfully disagree with their Decision, from four key perspectives, to wit, the philosophical, jurisprudential, pragmatic and the interests of justice to the extent to which they form part of the doctrinal foundations of judicial reasoning as the major tool available to judges in the judicial process. Hence, this Dissenting Opinion.

2. Let me begin by observing that this Motion confronts the Special Court with the delicate task faced by all International Criminal Tribunals *of balancing "the prosecutor's obligations to prosecute the most serious international crimes which might require accommodating changes in prosecutorial strategy as well as amendments to indictments as a result of discovering new evidence, while guaranteeing the fairness of the trial proceedings and upholding the rights of the accused".*[1] Predicated upon this premise as to the nature of the Court's task as presented by this Motion, it cannot be denied that in determining whether to grant an amendment of an indictment that has been approved the right of the accused person to a fair and expeditious trial and the overall interests of justice become issues of paramount consideration in the equation.

3. With this key observation, let me respectfully indicate that the majority Decision fails to pay due regard or attach primacy to the right of the Accused persons herein to a fair and expeditious trial, for reasons I will articulate in the following paragraphs of this Opinion. But before doing so, let me say that I agree with and adopt *in extenso*, the characterisation of the parties' written and oral submissions in respect of this Motion as recorded and reflected in the majority Decision of my learned brothers Judge Boutet and Judge Itoe.

PHILOSOPHICAL AND JURISPRUDENTIAL PERSPECTIVES

4. I have just asserted that my disagreement with the majority Decision is from four perspectives: philosophical, jurisprudential, pragmatic and the interests of justice. Let me now address the philosophical and jurisprudential together and say straightaway that from this dual perspective, it seems to me that the major issue to beaddressed, preliminarily, is that of the relevant body of jurisprudence to be applied to applications of this nature. Where it is determined that such applicable body of jurisprudence is an issue free from doubt, then there can be no judicial disputation as to its applicability to the matter in hand. However, where the issue of the relevant body of jurisprudence is one fraught with controversy, then nothing must be judicially taken for granted.

5. The issue must then become one of very careful judicial inquiry as to what sources of law should provide guidance. It cannot be asserted with any degree of accuracy that there is, as at yet, at the level of international criminal adjudication, a settled and authoritative *corpus* of jurisprudence applicable in granting amendments to indictments. To seek to apply whatever

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[1] See Archbold *International Criminal Courts Practice, Procedure and Evidence*, London: Sweet and Maxwell, 2003 para 6 – 66

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disparate, incoherent and inconclusive general principles that exist in the form of an evolving jurisprudence ***without constructive adaptation*** is a logical mistake that may well make us, as judges, victims of *the fallacy of slippery precedents.*

6. It does not take much legal research effort to discover that there are only a few general principles of law deducible, at this point in time, from the existing evolving international criminal jurisprudence on the subject of amendment of indictments. Understandably, case-law authorities are sparse. For the purpose of this Opinion, a few key samples of such propositions will suffice. These include:

   (i) *The question as to whether an amendment of an indictment shall be granted is within the discretion of the tribunal;*

   (ii) *" no doubt, size can be taken into account in considering whether any injustice would be caused to the accused: but provided other relevant requirements are met, a court would be slow to deny the prosecution a right to amend on that ground only"*[2];

   (iii) *"In general, an amendment to a confirmed existing indictment is sought for the following reasons: to add new charges to a confirmed Indictment, to expand and elaborate upon factual allegations adduced in support of existing confirmed counts or to make minor changes to the indictment"*[3];

   (iv) *"The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the Accused unfairly."*[4]

7. Suffice it further to say that all we have, at this stage, as working jurisprudential tools to determine the merits or otherwise of applications for amendment of indictments in the international criminal law sphere are the respective Rules of ICTY, ICTR, and this Court, Under the ICTY and ICTR systems, the relevant guide is Rule 50(C); under our system, it is Rule 50(A). In their present state, these rules are still untested, and undoubtedly since the ink is hardly dry on them, they have not yet been the subject of a consistent, coherent, and settled body of principles. However, the Court must still proceed to a determination of the merits of applications of this nature. One plausible approach is for this Court, through the technique of judicial development of the law, to interpret Rule 50(A) in the light of the autochthonous and unique juridical features and other related factors of this tribunal in the peculiar context of its own specific needs, mandates and realities as an adjudicating body of alleged offences of not only grave international import but also of crimes of equally grave dimensions under certain laws of Sierra Leone. *Such an approach seems justified by the consideration that in era of international criminal adversarial litigation dominated by a tremendous accretion of prosecutorial discretions, judicial guarantees and safeguards of the rights of the accused must be given paramountcy by judges sworn to administer justice faithfully, conscientiously and impartially.*

8. Predicated on this analysis, it seems to me that there is no judicial warrant for any evolving international jurisprudence on the subject of the amendment of indictments to be strictly patterned after general principles imported from the national law systems (where such

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[2] *Prosecutor v. Kovacevic*, Case No: IT-97-24-AR73, ICTY Decision Stating Reasons for Appeals Chamber Order of May 29, 1998, July 2 1998, paras. 20-37; also noted in Archbold, *supra* note 1.

[3] *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, ICTR Decision on Prosecutor's Request for Leave to file an Amended Indictment, June 21, 2000, para. 33.

[4] *Prosecutor v. Mile Mrksic, Miroslav Radic, Veselin Sljivancanin*, Case No. IT-95-13/1-PT, ICTY Decision On Form of Consolidated Amended Indictment And On Prosecution Application to Amend, 23 January, 2004, para. 61.

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principles as adumbrated by the courts lean heavily *in favorem procuratorem)*, ***without very careful and constructive adaptation*** to the different prevailing legal culture in the international criminal law domain. I emphasize this point because to my mind the almost unregulated flexible approach to the question of amendment of the indictments implicit in the evolving international jurisprudence is more akin to, for example, the English and Sierra Leone national law approach to the issue. In those two jurisdictions, the general principle is as follows:

> "Where, before trial or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice".[5]

9. ***What kind of constructive adaptation is, therefore, necessary in respect of imported general principles from national law systems on the subject of amendment of indictments?*** Such a process should begin with recognition, by way of methodology, of the variance in socio-legal norms and realities prevailing in the two legal domains. It may be predicated upon a new doctrine, namely, that where an indictment alleging the commission of grave crimes against international law has been approved, there should be a presumption against amendment unless the circumstances of the case otherwise dictate. In a less complex sense, it may be contended that such methodology is dictated, as this Chamber noted in a different context, by "logical necessity, common sense and due regard to the practical realities".[6] In essence, the Special Court must design its own special principles to reflect its own special juridical character. This is the rationale behind its founding instruments. This reasoning, therefore, becomes a useful starting-point, for the purposes of this Opinion, for a discussion of the factors based on judicial pragmatism compelling my divergence from the judicial pathway taken by my learned brothers Judges Itoe and Boutet.

PRAGAMATIC PERSPECTIVES

10. To my mind, the question whether to grant an amendment to an indictment or not within the peculiar context of the seemingly overarching restricted mandate the Special Court for Sierra Leone, as an international criminal tribunal, and the general principles relating thereto cannot, objectively, be considered in isolation from certain pragmatic influences, (which I prefer to characterise as secondary factors) ***ideally not in consonance with judicial orthodoxy,*** dictated by the peculiarities and specifications of the Court, namely: its history, its uniqueness, its statutory mandate, its heavily-constricted judicial life-span, the regime of budgetary and fiscal constraints to which it is subjected, its completion strategy, its sensitivity to the pressures for institutional accountability and transparency on its part vis-à-vis the international community and the population of Sierra Leone, and its functional legitimacy and credibility. These are imponderable variables that cannot be completely ignored, or discounted in working out the final judicial equation of whether or not to grant the amendments sought. Cumulatively, they seem to militate against any further delay in starting the trials.

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[5] See Archbold. *Criminal Pleading, Evidence and Practice*, London: Sweet & Maxwell, 2003 para 1-149. See also the Sierra Leone Criminal Procedure Act No. 32 of 1965, Section 148(1).

[6] *The Prosecution v. Issa Hassan Sesay* (Case No. SCSL-2003-05-PT), Decision and Order on Defence Preliminary Motion for Defects In the Form of the Indictment, 13 October 2003 at para. 9.

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INTERESTS OF JUSTICE PERSPECTIVE

11. I also dissent from my learned colleagues' Decision for these additional reasons. First, that of the protracted interval of eight (8) months between the Prosecutor's discovery of the evidence alleged to be in support of the proposed new count 8 of Other Inhumane Acts (forced marriage) and the filing of the Motion for amendment. On this issue, it is worth noting, by way of persuasive value, the observation of the English Court of Appeal in *R. v. Johal and Ram*[7], to the effect that:

> "The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

12. This evidence was available to the Prosecution in June 2003; it did not apply to have the new charge incorporated in the Indictment until February 2004. In my view, this shows the following:

    (i) lack of due professional diligence on the part of the Prosecution despite attempts to explain this away by claims of time-consumption in evaluating the evidence;

    (ii) a lapse in professional sensitivity to the rights of the Accused;

    (iii) that granting the amendment is very likely to occasion undue delay in giving effect to the right of the Accused persons, which concept is always a key function of the efficaciousness or otherwise of the right of the Accused to a fair and expeditious trial statutorily guaranteed under Article 17(2)(c) of the Court's Statute;

    (iv) granting the amendment sought, in the face of the eight (8) months intervening period of time between the discovery or availability of the evidence and the filing of the application for amendment of the indictment, amounts to a clear infringement of Article 17(4)(a) of the Court's Statute which enshrines the right of an accused to be informed promptly and in detail of the charges against him.

13. It is also of significance that apart from the prejudicial effect of granting amendments sought on the right of the Accused to a fair and expeditious trial as articulated in paragraph 12 above, there is a great likelihood of some adverse effects on, for example, victims and witnesses for both prosecution and defence. One such effect is the agony and trauma of having to wait much longer to testify and to see this allegedly unhappy episode in their lives given a closure.

DISPOSITION

14. For the foregoing several considerations and reasons, I am convinced that if there were a deserving contemporary instance to which I would unhesitatingly apply the maxim - ***Justice Delayed is Justice Denied*** - this would be it. Hence, my respectful dissent from the majority position.

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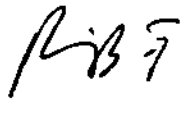
[7] 56 Cr. App. R. 348.



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15. Of course, I have no judicial reservations about amendments of an editorial nature. My dissent relates only to amendments of substance. I therefore deny, and accordingly dismiss the Motion to the extent that it seeks the incorporation of a new count in the Consolidated Indictment ordered pursuant to the Joinder Decision of this Court.

Done at Freetown this 6th day of May 2004

Judge Bankole Thompson
Presiding Judge,
Trial Chamber

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