SCSL-2004-14-PT
(7001 – 7040)

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 20 May 2004

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-PT)

DECISION ON PROSECUTION REQUEST FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:

Luc Côté
James C. Johnson

Defence Counsel for Sam Hinga Norman:

James Jenkins-Johnston

Defence Counsel for Moinina Fofana:

Michiel Pestman

Defence Counsel for Allieu Kondewa

Charles Margai

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 against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa 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 Norman on 19 February 2004 ("**Norman Response**");[1] the Response filed by Defence for Fofana on 19 February 2004 ("**Fofana Response**");[2] the Response filed by Defence for Allieu Kondewa on 19 February 2004 ("**Kondewa Response**");[3] and the Prosecution Reply thereto filed on 24 February 2004 ("the Reply");[4]

NOTING the Order for filing a Consolidated Reply, 23 February 2004;

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

CONSIDERING ALSO the Prosecutor's Submissions to Trial Chamber's Questions Pursuant to Status Conference filed on 9 March 2004 ("Prosecutor's Written Answers");

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 a group of indictees namely, Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, of the Civil Defence Forces (CDF), all of who stand indicted and detained for war

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[1] *The Prosecutor v. Samuel Hinga Norman et al.*, Defence Response to Prosecution Request for Leave to amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 19 February 2004.
[2] *The Prosecutor v. Moinina Fofana (et al.)*, Defence Response to the Prosecution Request for Leave to amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 19 February 2004.
[3] *The Prosecutor v. Allieu Kondewa*, Defence Response to Prosecution's Request for Leave to Amend the Indictment, 19 February 2004.
[4] Consolidated Reply to Defence Response to Prosecution Request for Leave to Amend the Indictments against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 24 February 2004.

crimes 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" in the months of March and June, 2003, were individual indictments that were approved by His Lordship, Judge Bankole Thompson.

3. On 9 October 2003, the Prosecution made an application to the Chamber to seek a consolidation of 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, 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; one for the AFRC group of indictees, namely, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu and finally, one consolidated indictment 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 4 more and new counts on the already consolidated indictment. These include counts 9-12, which for the first time, indict the accused with gender offences, namely rape, sexual slavery, other inhumane acts like forced marriages, and outrages upon personal dignity. The prosecution also seeks to extend the time frames of certain existing charges and to include additional locations and confirms that the proposed amended indictment contains new factual allegations based on "new evidence that has recently come into its possession" in the course of the on-going investigations.

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.

8. The Defence has filed replies for each of the 3 indictees and contests the arguments of the Prosecution. They argue;

   i. That the facts and locations are new and that it would require conducting fresh and extensive investigations;

   ii. That their clients are for the very first time, being indicted for gender offences;

   iii. That the trial of their clients would be unduly delayed if the amendment to add new counts, which they argue, is not timely introduced, were granted, and further;

   iv. That the rights of the accused under the provisions of Article 17(4)(a) and 17(4)(c) of the Statute will be violated.

They urge the Chamber to dismiss the motion in the light of these arguments.

SUBMISSIONS OF THE PARTIES

9. We would now proceed to examine the factual and legal arguments of the Parties which, briefly stated, and are borne out by their submissions, are as follows:

For the Prosecution

10. (a) The Prosecution seeks to add four new Counts, that is, 9 – 12 of the proposed amended Indictment, which raise allegations of sexual offences against the accused for the very first time. The counts include allegations of "Rape, a crime against humanity", "Sexual Slavery and other form of sexual violence, a crime against humanity", "Other inhumane acts, a crime against humanity (forced marriages)" and "outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II." Furthermore, the Prosecution seeks to extend the time frames of certain existing charges and to add new geographical locations.

(b) That the purpose of the amendments is to permit the incorporation in the indictment of allegations based on new evidence uncovered recently by the Prosecutor from on-going investigations.

(c) That there was no undue delay in seeking to amend the indictment on the grounds that witnesses were reluctant to come forward to testify as to sexual violence, and that it was "in

the interests of judicial economy" to request amendment after the decision on the joiner Motion, so as to avoid filing separate motions for each Accused. The Prosecution also submits that the amendments will not prejudice the expeditiousness of the trial because a date has not been set for trial so no adjournment of proceedings will be required.

(d) The Prosecution attached a three-page "Investigator's Statement" to the Motion submitted as the "Prosecutor's Case Summary". This states that additional evidence has been found since confirmation of the indictments suggesting amongst other things, the subjection of women and girls to various forms of sexual violence.

The Norman Response:

11. Defence for Norman argued that the motion should be dismissed on the following grounds:

a. That there would be undue delay if this motion were granted in that a date has been set for the status conference and the date for trial is expected to be set on that occasion.

b. That the amended indictment extends the timescale over which the Accused Norman is being charged with crimes from 5 months to 33 months and that this fundamentally alters the entire basis and strategy of Defence preparation.

c. That these new changes will entail the Defence spending more time than anticipated on investigations, and that these investigations are themselves likely to cause delay. It argues that with the expanded timeframe, the Defence is likely to have to interview senior officials abroad who may not be available immediately for interview.[5] Additional witnesses will add to the length of the trial, causing the Special Court to breach its three-year mandate, because as the Defence asserts, the President of the Appeals Chamber observed that the Defence would need a minimum of 6 - 9 months for case preparation, and that these new charges put the Defence back to their starting point, a fact which will considerably delay the start of trials.[6]

d. That it is in this amended indictment that the first allegation of sexual offences is made against the Accused Norman. If the Prosecution, as it alleges, found witnesses reluctant to come forward in relation to sexual offences and that this was what caused the delay in

[5] Norman Response, paras 18 - 19.
[6] Norman Response, paras 23 - 24.

submitting the amended indictment, the Defence will likewise encounter reluctance and delay in their own investigations.[7]

e. That the Accused Norman has not been promptly informed of the nature of the charges against him.[8]

f. That should the motion be allowed, it would amount to an abuse of process in that the Defence made concessions on dates in relation to the Preliminary Motions on Child Soldiers and the Lomé Accord which would not have been ceded if it had been known that the timeframe of charges brought against the Accused Norman was going to be expanded.

g. Furthermore, that if the motion is granted, the Prosecution would obtain an improper tactical advantage, and that it will become necessary to rehear all the existing preliminary motions. New preliminary motions may be brought on the new charges.[9]

h. The Defence argues that they were deprived of considering objections to the joinder motion based on the new allegations and the expanded timescale.[10]

i. That contrary to the Prosecution's contention, the motion is not timely. In relation to the Prosecution argument that the Motion was withheld pending the Joinder Decision, in the Defence's opinion, the imminent trial date and the approaching status conference outweighed any advantage to the Court in not receiving separate motions to amend the indictment.[11]

j. That the motion is untimely in view of the fact that the Prosecution is seeking to bring fresh charges two years after having commenced investigations: when they in fact had more than ample time to bring the charges earlier, especially given that they were situated at the site of the alleged atrocities.[12]

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[7] Norman Response, para. 21.
[8] Norman Response, para. 22.
[9] Norman Response, paras 25 - 28.
[10] Norman Response, para. 29.
[11] Norman Response, para. 31.
[12] Norman Response, paras 33 - 34.

k. That the *Bizimungu* case decided that an indictment may be amended solely when it adds particulars: in the instant case the amendment sought would expand the indictment itself.[13]

l. That the cumulative effect of granting the motion would be to severely prejudice the rights of the Accused and would amount to an abuse of process.

The Fofana Response:

12. The Defence for Moinina Fofana submits that the Motion be dismissed on the basis that what the Prosecution is seeking to amend is not clear, because the amendments proposed in the Motion do not correspond to the text of the amended indictment as annexed to the Motion.

13. To clarify this situation, the Defence requests that a detailed exhaustive comparative table of proposed amendments be filed.[14]

14. That there has been no supporting material submitted despite the allegedly new facts on which new and extended charges have been sought.[15]

15. That it would prejudice the case of Fofana in that the amendments are sought less than two months before the trial and that the Defence will not be given adequate time to prepare the case or alternatively, the inevitable delay in commencing the trial will prejudice the Accused's rights to trial without undue delay.[16]

The Kondewa Response:

16. In the Kondewa Response, many arguments overlapped with those brought by Counsel for Norman. These included arguments relating to the unrestricted access of investigators to investigations for over a two-year period, the potential need for the Defence to re-strategise the entire case, and the inadequacy of the 'judicial economy' argument in relation to the timing of the Motion. As with the Norman Response, the Kondewa Response also mentioned *Bizimungu* in relation to the need to counterbalance the rights of the Accused, and the fact that amendments should only be granted if seeking only to add particulars. The tactical advantage to the Prosecution in relation to case preparation is also highlighted. In addition, the Defence

[13] Norman Response, para 35.
[14] Fofana Response, paras 4 - 8.
[15] Fofana Response, paras 9 - 13.
[16] Fofana Response, paras 17 - 20.

submitted that Kondewa's case was exceptional as he is the only Accused who only speaks Mende and not Krio, and that accordingly, his right to adequate time for case preparation would be exceptionally prejudiced by the amended indictment because of the need for translation.[17] In the event that the motion is granted, the Defence asks for more time.[18]

The Consolidated Reply by the Prosecution:

17. The Prosecution reiterates many of its earlier arguments. Additionally, according to the Prosecution, the comments made by the then President of the Special Court in the Decision on Denial of Right to Appeal do not imply that the right to an expeditious trial is of such importance that legitimate requests which could have an impact on trial dates should be rejected for that sole reason.[19] Furthermore it is submitted that the requested amendments should in any case have no impact on the start date of trial.[20] In the Prosecution's opinion, the new charges brought do not change the nature of the original charges and hence the Defence investigations so far.[21]

18. The Prosecution claims that any potential preliminary motions can be dealt with by the Trial Chamber.[22] The Prosecution also say that no tactical advantage will be obtained on existing preliminary motions and that "clearly these arguments are without merit and should be disregarded."[23] The Prosecution contends that the charge on child soldiers was continuous in nature and was the only charge in the indictment not limited to a specific time-period.[24] On the matter of joinder, the Prosecution states merely that the issues at hand have no bearing on joinder.[25]

19. The Prosecution notes this Motion is being brought pre-trial, stating that amendments are 'a major cause of delays in most trials'. The Prosecution also argues that the amended indictment streamlines the trial 'by eliminating objections that particular events are beyond the scope of the indictment'.[26] The Prosecution submits that the Defence for Kondewa was on notice of the additional locations in that these locations were incorporated into the Bill of Particulars for

[17] Kondewa Response, para. 1(c)-(d).
[18] Kondewa Response, para. 1(i).
[19] Reply, para. 7.
[20] Reply, para. 6.
[21] Reply, para. 9.
[22] Reply, para. 28.
[23] Reply, para. 29.
[24] Reply, para. 30.
[25] Reply, para. 36.
[26] Reply, para. 11.

Kondewa.[27] Furthermore, the Prosecution complains that the time at which investigations started is immaterial and the discovery of new facts could not have been anticipated.[28] It is also observed that the added locations were 'envisioned' in the original indictments.[29]

20. The Prosecution submits that the right of the Accused to be informed promptly of the charges against them comes into play when charges are brought, and so that right arose when the request to amend was filed, not at the time of filing the original indictment.[30]

Prosecutor's Written Answers:

21. In the course of oral discussion the Chamber asked the Prosecution to clarify a number of issues. The Prosecution requested a written copy of the questions asked, and suggested that each question would be addressed in writing after the hearing. In the Prosecutor's Written Answers, the Prosecution provides dates for the discovery of evidence supporting the extended time-frames in the amended indictment and explains the delay in filing for amendment by reason of the need to evaluate and confirm the new evidence.[31] The inclusion of charges relating to sexual violence were only submitted in February 2004 despite initial indications of such evidence in June 2003. The Prosecution states that this delay was because of the time it required to evaluate and confirm evidence, and the need to secure the cooperation of witnesses.[32]

22. The Prosecution clarifies that the additional locations in the amended indictment are new locations and not just further particulars.[33]

23. That although it is not mandatory for the Prosecutor to bring charges relating to forced marriage, the Prosecutor feels that he has a duty to bring these charges due both to their serious nature, and also because under Article 15, paragraph 4 of the Statute of the Special Court the Prosecutor is specifically directed to give due consideration to appointing staff experienced in gender-related crimes, which the Prosecutor interprets as a special duty to prosecute gender-related crimes.[34]

24. It therefore urges us to grant the motion.

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[27] Reply, para. 13.
[28] Reply, para. 23.
[29] Reply, paras 33 - 34.
[30] Reply, para. 26.
[31] Prosecutor's Written Answers, para. 1.
[32] Prosecutor's Written Answers, para. 2.
[33] Prosecutor's Written Answers, para. 4.
[34] Prosecutor's Written Answers, para. 5.

DELIBERATION

25. 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.

26. 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.

27. During the Plenary Meeting of the Judges of the Special 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;

(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."

28. The other relevant provision of the law is Article 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."
>
> ...

29. Furthermore, Article 9(2) of the International Covenant on Civil and Political Rights (ICCPR) 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".

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

31. 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.

32. 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.

ANALYSES

33. In fact, the justification for application to amend charges or indictments stems from the very notion of drafting imperatives in criminal law, be it international or municipal, where for every offence alleged and supported by the available evidence, there must be a separate and distinct count.

34. Following this legal constraint, it is the traditional role and practice for the prosecution to bring as many counts in an indictment as possible and to amend them where it becomes necessary. Although it does not impose on the Prosecutor the obligation to bring all the charges that are borne out by the evidence, nothing prevents or prohibits him from preferring and bringing all the charges on which he intends to base his prosecution to the knowledge of the Court and to that of the defence, 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

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

36. We recall here that in the TADIC CASE, the Appeals Chamber of the 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

37. We know that the burden of proof which 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".

38. 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 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.

39. To attain these objectives, we hold the view 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

40. 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."

41. 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.'

42. These provisions underscore the necessity for international criminal justice to highlight the high profile nature of the emerging circus 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 extraordinary vigilance, diligence and attention, so as to immediately and without any "undue delay", as stipulated by Article 17(4)(c) of the Statute of the Court, bring before justice for trial, all those suspected of having committed gender offences and other categories of offences within his competence.

43. If the purpose of the amendment sought, as the Prosecution alleges, is to prosecute those offences whose facts "have just recently come to its knowledge" the question the Chamber would like to be addressed is whether a recourse to an amendment to add fresh and new charges as it is in this case, would have been necessary if the Prosecution, during and after more than 2 years of investigations, had exercised due diligence to uncover long before now, these offences which we would imagine, should have been included, not only in the original individual indictments, but also in the 3 consolidated indictment that the Prosecution filed with our leave and following our Ruling and Order dated 27th January, 2004.

PROSECUTION'S QUESTIONS AND ANSWERS

44. In the Prosecution's written answers, it is observed that an amendment to permit the inclusion of charges relating to gender-based crimes was only submitted in February, 2004, despite the availability of such evidence since June, 2003.

45. The Defence for its part, observes that the Prosecution commenced investigations long before the arrest of the first Accused on the 10th of March, 2003, and thereafter, their initial appearances that commenced on the 15th, 17th and the 21st of March, 2003, before His Lordship, Judge Benjamin Itoe, again with the first accused, and thereafter, that of the second and third accused before his Lordship, Judge Pierre Boutet on the 30th of June, 2003.

46. It contends that the Prosecutor had more than ample time to have brought these charges against the Accused. The Defence further argues, and we quote, "[...] that diligent prosecutors would have ensured that investigators had fully interviewed potential witnesses with a view to ascertaining the full extent of the Accused's culpability and to be able to fully prosecute the Accused." The Defence therefore submits that granting the Prosecution's application for an amendment at this stage would amount to an abuse of process and therefore urges the Chamber to dismiss the application.

47. The Prosecution, in one breath, attributes this delay to the time it required to evaluate and confirm evidence and the need to secure the cooperation of witnesses who were going to testify to these allegations, before the amendment could be filed. In yet another breath, the Prosecution admits withholding the application to amend because it was waiting for the outcome of the joinder motions and to file for the amendment after the decision on the joinder.

48. We find this position unacceptable and untenable. Even if it were, shall the Accused have to wait indefinitely and for as long as the Prosecution is engaged in this protractedly indefinite expedition whose results may either be uncertain or not forthcoming at all? And if so, for how long will the Accused have to wait?

49. This prosecutorial strategy is, to our mind, neither commendable nor acceptable in this context and particularly having regard to all the interests at stake. We want to underscore the point and to say here that it even becomes counterproductive when the process is protracted and violates in one way or the other, the statutory rights of the Accused to "a fair and expeditious trial" that precludes all procedures which occasion "undue delay" in achieving that objective.

50. We recognize that amendments are an important tool in the armory of the prosecution in which there is a permanent quasi mathematical quest to ensure the congruence of the facts and the evidence assembled in the course of the investigations, to the indictment that has been preferred against the accused. We further recognize the statutory rights of the Prosecution to indict accused persons to the full extent of the law and to present the relevant evidence before the Court and that this can be achieved through the amendments like this one where it is seeking to introduce 4 new counts and new geographical locations.

51. 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.

52. 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" and within the context of course of the doctrine of "equality of arms" between the Prosecutor and the Defence.

53. For our part, as a Special Court with a time limited mandate, what could amount to "an undue delay" in trying an accused is certainly more demanding, and we would say that it really means "a much shorter time frame" that may be longer in municipal judiciaries which are institutional monuments that do not wither away with time like international criminal tribunals such as ours,

do. Extreme expeditiousness in trying the accused persons should therefore be, and is in fact, our watchword while we remain preeminently preoccupied by, and still determined in ensuring that justice to appear credible and to be so perceived, should not only be done, but should manifestly and undoubtedly be seen to have been done.

54. In this motion, the prosecution purports to act in the exercise of its statutory powers to prosecute accused persons to the full extent of the law, and to present all the relevant evidence before the Court. It argues that the amendment is necessitated by 'just recently discovered evidence'. This suggests that since the commencement of investigations, no evidence of gender offences has been available to the prosecution and that the amendment sought, particularly before the commencement of the trial, is timely and will not occasion a serious prejudice to the rights of the accused.

55. What sharply contrasts with this assertion and contradicts it is that in answers to questions put by the Court to the Prosecution as part of the Status Conference, the Prosecution admits that it was in possession of evidence on gender related offences against these accused persons since June 2003, that is just 2 months after the 1st Accused's arrest and initial appearance and coincidentally, during the same month of June 2003, when the 2nd and third accused made their initial appearances at the tail end on the 30th. It is difficult for us, in this context, to be convinced by the Prosecution's assertion that evidence which was available since June 2003 could, in February 2004, that is, 8 months thereafter, when the amendment is sought on the basis of that evidence, be considered as evidence which has "just recently" come to the knowledge and possession of the Prosecution.

56. Our duty in situations of this nature, where statutory interests are in conflict or in competition, is to ensure a rigorous respect for 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. To attain this objective, answers to a few questions will clarify the situation. The first is whether the evidence the Prosecution is relying on to base the amendment has, as it affirms, just come to its possession.

57. We note, like we have already observed, that this reason advanced by the Prosecutor of a time-framed Court, after 2 years of investigations, is neither credible nor convincing. We say this because it is difficult to understand how the prosecution, operating with 'prosecutors and investigators experienced in gender related crimes" as stipulated in Article 15(4) of the Statute, could easily have come by evidence of rape, sexual slavery and other gender offences in respect of

the RUF/AFRC group of indictees but failed to do so for those of the CDF group even though the nine indictees of the 3 groups were operating within the same territory, and virtually contemporaneously.

58. We are, in the light of this observation, constrained to hold the opinion that if any gender offence or offences existed at all against those accused persons who are the subject matter of this motion, this should have been uncovered through the exercise of the ordinary and normally expected professional diligence on the part of the Prosecution and the investigators, and the accused brought to justice after having, as was the case with the other offences for which they now stand indicted, been informed and in detail, of the nature and cause of the charge against them as mandatorily stipulated in Article 17(4)(a) of the Statute.

59. The second question is whether the rights of the accused persons would be violated if the amendment sought by the Prosecution were granted. We have, in this regard, already indicated that applications for amendments would ordinarily be granted if they would serve the overall interest of justice and particularly if they do not violate the statutory rights guaranteed to the accused under Article 17 of the Statute and other International Conventions.

60. We would like to say here that in providing an answer to these two questions, two major factors have to be considered, namely, the time-limited mandate of this Court and the necessity to examine every application for an amendment on its merits and on a case by case basis.

61. In alluding to the limited mandate of the Court which is a permanent preoccupation of the 3 Judges of this Chamber in the discharge of the duties conferred on them by the Secretary General of the United Nations and the Government of Sierra Leone, we would like to express here, our resolve to do everything so as to live up to this mandate while remaining committed to our judicial norms as Judges and do state that we do not at any time, intend to shirk our responsibilities to fully perform our duty of administering justice in a transparently acceptable manner, without fear or favour, affection or ill will. We do in fact affirm here that nothing, notwithstanding suggestions from the Defence that we should proceed even at a speed that could be recklessly fatal to the cause of justice because of our time-limited mandate, will inhibit us in fulfilling our commitment to it and in attaining the objectives assigned to us in a manner we consider thorough and in total respect of our judicial traditions and norms.

62. In determining therefore, whether the rights of the accused under the Statute, and in the context of this particular case, would not be violated if the amendments sought were granted, we

note that the 4 counts sought to be incorporated to this indictment are completely new and as the Defence has observed, this factor fundamentally alters the case that it now has to meet not only geographically, temporarily and also in terms of the nature of the charges their clients face.

63. Certainly, the interests of justice permit the defence to exercise their rights to file preliminary motions under Rule 72 in relation to the new charges, and this, in accordance with the provisions of Rule 50(B)(iii) of the Rules of Procedure. It also of course confers on them, the right to carry out their own investigations on these 4 new charges for a period that may or may not take a shorter time than the 2 years it took the prosecution to bring the 8 count indictment against the 3 accused persons, particularly so because the new locations involved in the amendment would require verifications. 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 in ensuring that it is "fair and expeditious", factors which would occasion a breach of the rights of the accused persons under Article 17(4)(C) of the Statute if the amendment were granted.

64. In this case, it has taken the prosecution over 2 years to detect gender offences against the accused persons and in fact, one year after their initial appearances when the accused would have, if the prosecution were reasonably diligent, been informed promptly and in detail, of "the nature and cause of the charge against them". We observe therefore that the prosecution was in breach of the ingredient of timeliness as statutorily required by the Statute and so would any order emanating from us granting this motion to amend their indictment.

JURISPRUDENCE CITED

65. To support its case, the Prosecution has cited a number of cases. In the case of the PROSECUTOR VS JEAN-PAUL AKAYESU, we find that the facts available to us at this moment, do not give us a clue on what the decision granting the amendment was based. In the case of the PROSECUTION VS ALFRED MUSEMA, the application was made firstly to add only one count, secondly to expand on the facts adduced in the existing indictments and thirdly, to amend count 7 of the indictment as indicated in counts 8 and 9 respectively of the proposed indictment. In the MUSEMA case, the amendment was a mere technicality which, it was considered, would not occasion a prejudice to the rights of the defence.

66. Besides, very much unlike the case whose motion we are now examining, the MUSEMA case had given an indication earlier on the amendment, and statements related to the said

amendment were already disclosed to the defence 4 months earlier preceding the introduction by the Prosecution of the motion to amend.

THE BIZIMUNGU CASE

67. It was mainly the interest of the accused which principally preoccupied the Trial and the Appeals Chamber of the ICTR in refusing an amendment sought by the Prosecution in the case of THE PROSECUTION VS CASIMIR BIZIMUNGU, JUSTIN MUGENZI, JEROME BACUMUM PAKA AND PROSPORE MUGARASEZA, CASE NO ICTR-99-50-I of 6th October 2003. In that case, the following factors, some of which hold good for the motion we are examining, contributed to the dismissal of the motion by the Prosecution to amend the indictment:

(i) The accused Bizimungu, had been held in custody for 4 years and 7 months and the application to amend was introduced 2 months before the date of trial fixed for the 3rd of November, 2003.

(ii) The indictment itself was dated 28th July, 2003, the same day that the prosecution had informed the Trial Chamber in writing of its intention to amend the indictment.

(iii) The said indictment was only filed, 28 days later after its signature on the 28th of July, 2003. Diligence in timing and in the filing of the amended indictment was lacking.

(iv) The facts covered by the amendment were substantially new in that it sought to introduce completely new allegations.

The Trial Chamber upheld the submission of the Defence to the effect that Bizimungu had been detained for more than 4 years and argued that it will be prejudiced if the Chamber grants a motion to amend the indictment after such a long time in detention and only 2 months before the commencement of trial.

68. The Court of Appeal in upholding the Trial Chamber's refusal to grant the motion by the prosecution to amend the indictment on the grounds hereinbefore enunciated had this to say:

> "... Although the Prosecution may seek leave to expand its theory of the accused's liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment and thereby increase the fairness and efficiency of proceedings, should be encouraged and

usually accepted...However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused...".

The Appeal of the accused was accordingly dismissed.

69. In our opinion, the procedure for the amendment of the indictments provided for under Rule 50 (new) which we are applying in this case since the matter is being adjudicated upon after its coming into force on the 11th of May, 2004, is, as we have noted, a judicial discretion and a vital regulatory weapon at the disposal of the interests of justice in the conduct of criminal prosecutions and that Judges should exercise this discretion judiciously.

70. Without seeking to be enumerative in order not to be limitative on the broadly based criteria for exercising this discretion one way or the other, we are of the opinion that it is intended to enable the Court , on a case to case basis, either of its own motion on the basis of the evidence, or at the instance of the Prosecution, to effect amendments which are timely; which are made principally in the overall interests of justice with a view to enhancing the fairness and the integrity of the proceedings; and which neither occasion an undue delay of the proceedings against the accused, nor prejudice or pervert the course of justice, or have the effect of violating the statutory rights of the accused.

71. In fact, the outcome of an application to amend an indictment should, and does necessarily, hang on an some elastic device which, in the exercise of that judicial discretion by the Court, can either be distended or constricted, depending on all the circumstances which determine the applicable criteria in a particular case, and which, in any event, must take into consideration, the rights of the Parties and the overall interests of justice.

72. The prosecution in the motion before us, canvasses the argument that the application to amend is timely and that it would not occasion an undue delay in commencing the trial of the accused because the application is made even before the trial commences.

73. Plausible as this argument sounds, we would like to say that it is not convincing in that what preoccupies us is as much the granting of the amendment as the consequences that such an amendment would generate and how it would impact on the subsequent hearing of this case which is scheduled to commence in the very near future.

74. The Defence, as we have observed, argues that if the amendment to include 4 new counts and new geographical locations were granted, it would have to file new preliminary motions under

Rules 50 and 72 of the Rules of Procedure and Evidence and also conduct detailed investigations before being ready for the trial. This certainly as we have already observed, will take time and would occasion a disruption and a postponement of our schedule to commence the trials, a situation which, to our mind, could have been avoided if the prosecution had acted diligently and brought this application as early as in June, 2003, or soon thereafter, when it accepts and concedes, that evidence for gender offences against these accused was already available to it.

75. Let us say here that we indeed have come a very long way to arriving at this stage when we are about to commence the trial of the accused, a process which has been impaired and delayed principally by the flood of pre-trial motions filed by both the Prosecution and the Defence and also by other statutory pre-trial procedures which we had to, and did infact dispose of in preparation for and before commencing the trials.

76. These included more importantly, those filed by the Prosecution which, with a view to easing and fast tracking the process, were filed just when status conferences were supposed to commence, for a consolidation of the 9 individual indictments to 2 only and a joinder of the accused persons into 2 groups namely, the RUF and the AFRC group on the one hand, and the CDF group on the other. This we granted in the manner that appeared to us to be more in conformity with legal realities and the protection of the rights of the accused. It is again the Prosecution that has filed yet another motion to amend the indictment, an application which, if granted, will in our opinion, put the trial on hold, to the detriment of the Article 17 rights guaranteed to the accused by the Statute.

77. There must, at a certain stage, as we traditionally are compelled to observe, be an end to litigation which, as we know, is often engendered, at times on purpose, by a multiplicity of judicial processes. In this regard, we are of the opinion that exercising our discretion at this stage and in these circumstances in favor of granting the amendment sought by the Prosecution after obvious prosecutorial lapses that cannot be redeemed without violating the statutory rights of the accused, would not only manifestly amount to an abuse of the exercise of this inherent judicial power conferred on us, but would also be tantamount to an abuse of process.

78. The argument by the Prosecution that the application is timely because it is brought before the commencement of the trial, as opposed to those amendments which are granted even at an advanced stage of the trial, is strategic and sounds very attractive and plausible. However, given

the context of this particular case, this valid argument easily collapses in the light of the preceding analysis and because of the prosecutorial inattention to appreciate the particularity of the cases and the Court which is supposed to hear and determine them, and to have acted diligently and indeed, more expeditiously, in introducing the motion to amend much earlier.

79. We would like to say here that we are not, in these circumstances, minded to establish, as we would very well have been disposed to, a precedent to the effect that an application to amend a charge, particularly when it is made before the commencement of the trials, should, and must necessarily be granted for having supposedly satisfied the criteria of timeliness and this, even where the interests of the accused will be sacrificed in the process.

80. In fact, we hold in this regard, that granting an amendment of the indictment as requested by the Prosecution at this stage, should not, as was observed by the Lord Justices in the case of CANOM ENTERPRISES INC.V. COLES (2000) 5 0R, amount to an 'abuse of process' which, to the Lord Justices, engages "the inherent power of the Court to prevent the misuse of its procedure in a way that would... bring the administration of justice into disrepute."

81. Again, granting this amendment at this stage reposes on the inherent jurisdiction of the Chamber to exercise a discretion provided it does not amount to an abuse of process and as was observed in the case of THE HOUSE OF SPRING GARDENS LTD VS. WAITE [1990] 3 WLR 347, [1990] 2AER 990 (CA), the Court, "in invoking and exercising its inherent jurisdiction in this regard, prevents the misuse of its procedure in a way that would be manifestly unfair to a party to a litigation before it or would in some other way, bring the administration of justice into disrepute".

82. The Chamber is pre-eminently conscious of the importance that gender crimes occupy in international criminal justice given the very high casualty rates of females in sexual and other brutal gender-related abuses during internal and international conflicts.

83. We however want to observe and to hold, that the rules relating to the detection and prosecution of these offences are the same as those governing the other war crimes and international humanitarian offences, and must not constitute nor give rise to any exceptions to the general rules that relate to the respect and protection of the interests of the Parties, namely, the Prosecution and the Accused on the one hand, and the overall interests of justice, as we have highlighted in this decision, on the other.

84. In so holding, we are strongly of the opinion that creating exceptions in this regard for gender offences and offenders because of their sensitivity when it comes to determining whether the interests of the Parties and of justice have been afforded the protection which the law and the Statute accords in all equality to all parties, will be extra judicial, prejudicial to, and abusive of the entrenched rights of the accused persons, as they would indeed be in the case under consideration.

85. The Prosecution, in these gender offences, we hold, is still bound by these same rules that govern the detection, investigation and prosecution of the other crimes that fall within its competence and the exercise of due diligence that is supposed to accompany its action in this regard, because derogating from them would occasion a palpable miscarriage of justice.

86. It is therefore our finding and opinion, in the light of the foregoing analysis, that the arguments presented by the Prosecution are not convincing enough to sustain the motion, and furthermore, that granting the prosecution's application for an amendment of the indictment against these 3 defendants at this stage, would not only prejudice their rights to a fair and expeditious trial, but will amount not only to a violation of those rights guaranteed to them under the provisions Articles 17(4)(a), 17(4)(b) and 17(4)(c) of the Statute of the Special Court for Sierra Leone, but also to an abuse of process that will certainly have the effect of bringing the administration of justice into disrepute.

87. We accordingly dismiss the motion.

Done at Freetown this 20th day of May 2004

Judge Bankole Thompson — Judge Benjamin Mutanga Itoe

Presiding Judge,
Trial Chamber

[Seal of the Special Court for Sierra Leone]

Judge Pierre Boutet appends a separate and dissenting opinion to the decision of the Trial Chamber.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 31 May 2004

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-PT)

DISSENTING OPINION OF JUDGE PIERRE BOUTET ON THE DECISION ON PROSECUTION REQUEST FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:
Luc Côté
James C. Johnson

Defence Counsel for Sam Hinga Norman:
James Jenkins-Johnston

Defence Counsel for Moinina Fofana:
Michiel Pestman

Defence Counsel for Allieu Kondewa
Charles Margai

1. With all due respect for my Learned Brothers, the Presiding Judge Bankole Thompson and Judge Benjamin Mutanga Itoe, I cannot agree with their findings and decision with respect to this Application by the Prosecutor for Leave to Amend the Consolidated Indictment against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, these accused being refered jointly as the CDF Group.

2. The fundamental principles that this Court applied in its decisions on similar applications for amendments in the cases of AFRC and RUF[1] should receive similar application in this case where the prosecution is also seeking leave to amend the consolidated indictment against the CDF. Although the circumstances that existed did differ, in giving due consideration to the existing circumstances and having regard to the particular nature of the counts sought to be added to the existing indictment, that request by the Prosecution to amend the CDF consolidated indictment for the reasons that I will further describe below is overall in the interest of justice, will not cause any undue delay, and in my opinion should be granted in its entirety.

BACKGROUND

3. For the purpose of this decision, I will reiterate here what I view to be important and relevant parts of the AFRC and RUF Decisions as they relate more directly to the assessment of what I consider to be two essential factors that justified on my part a different consideration and findings than the one arrived at by the majority in this case:

> 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 defense 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 Defense.
>
> 28. [...]

[1] *Prosecutor v. Alex Tamba Brima et al.*, SCSL-2004-16-PT, 6 May 2004, Decision on Prosecution Request for Leave to Amend the Indictment against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu and *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-2004-15-PT, Decision on Prosecution Request for Leave to Amend the Indictment against Issa Sesay, Morris Kallon and Augustine Gbao, 6 May 2004 ("AFRC and RUF Decisions").

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.

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."[2]

And finally:

46. The crucial consideration in this process, in our opinion, is one of timing and whether the application for the amendment is brought at a stage in the proceeding where it would not prejudice the rights of the accused to a fair and expeditious trial and furthermore, whether it is made in the overall interest 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.[3]

4. All of these considerations and statements have indeed application to this motion as they pertain to duties and obligations of the Prosecution in international criminal tribunals and to the necessity to give proper consideration to this now emerging domain of gender-based crimes, two essential factors in determining this issue of timeliness.

SUMMARY DESCRIPTION OF FACTS AND CIRCUMSTANCES

5. In order to avoid unnecessary repetition and subject to the additional description in the following paragraph, I adopt for the purpose of this dissenting opinion the summary description of facts as well as the submissions of the Parties as embraced in the majority Decision.

6. To these facts so described, I would like to add the following information contained in the Court's record and in the material and information provided to the Court in support of this application. It is in my view of importance for the purpose of determining what were the circumstances that existed, the complexity of the issues and consequently the timeliness of the application:

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[2] *Id.*, paras 27-35.
[3] *Id.*, para. 46.

a. The decision by the Trial Chamber on Joinder was rendered on 28 January, 2004;[4]

b. This Motion was filed on 9 February, 2004;

c. The date for the beginning of the "CDF" trial has been set for 3 June 2004;[5]

d. The trial will proceed in alternance with another trial every month.

e. The Prosecution in their reasons as to why the amendment for gender-based crimes was brought, only in February 2004 submitted the following in the "Prosecutor's Written Answers":

> "Although the Prosecution had indications of gender based crimes as early as June and July of 2003, it was not until October 2003 that solid evidence capable of confirmation was obtained. The lapse of time between the discovery of the sexual violence evidence and the filing of the amendment was due to the need to properly evaluate and confirm the evidence. In addition, the Prosecution had to secure the full cooperation of the witnesses who were going to testify to these allegations before the amendment could be filed."[6]

f. Further, the Prosecution stated that:

> "The evidence relating to paragraph 28 of the Amended Indictment (Freetown looting) was disclosed in November 2003. The evidence relating to the charges on sexual violence and the remaining changed paragraphs of the Amended Indictment was disclosed on 17 February 2004."[7]

g. Lastly, the Prosecution added the following comments as to the reasons for not filing the request to amend the indictment before or with the joinder motion:

> "As discussed above, the earliest that the amendment could have been filed was late November, in that the evidence relating to the gender-related crimes was only properly confirmed and ready for charging at that time. The motion for joinder was filed in October. Therefore, and in the interest of judicial economy, the Prosecution took the decision to wait for the outcome of the joinder motion before filing its request to amend, thereby filing only one motion instead of three separate motions in the CDF case alone. Including the RUF and

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[4] *Prosecutor v. Sam Hinga Norman*, SCSL-2003-08-PT, *Prosecutor v. Moinina Fofana*, SCSL-2003-11-PT, *Prosecutor v. Allieu Kondewa*, SCSL-2003-12-PT, Decision and Order on Prosecution Motions for Joinder, 28 January 2004;
[5] Order for Commencement of Trial, 11 May 2004.
[6] Prosecutor's Written Answers, para. 2.
[7] *Id.*, para 3.

the AFRC cases, there would have been a total of nine motions to amend before the Trial Chamber."[8]

DISCUSSION

7. As described in the "Background" section above with reference to the AFRC and RUF Decisions where the Prosecutor had made similar application for amendments, the question to be asked again is whether application for the amendment is brought at a stage in the proceedings where it would not prejudice the rights of the defense 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 Defense.

8. Thus, the key issue that this Court has to dispose of in this application is whether the proposed amendments, if granted would violate the right of the accused to be tried without undue delay. In proceeding to make that assessment, as this Court has stated: "the crucial consideration in this process ... is one of timeliness". To that extent and posed in those terms only and for that limited purpose I share the views of the majority. However, I differ essentially and fundamentally on two grounds from the findings and the Decision of the majority:

   (a) in their analysis of what in the circumstances that existed did constitute "undue delay", if any, and

   (b) in not giving due consideration to the special features related to the proper exercise of discretion by the Prosecution and to the nature of the counts to be added to the consolidated indictment: gender-based crimes.

"Undue Delay"

9. What is an undue delay and what would constitute such delay in the circumstances needs to be established first before looking at the specific factors. In this respect, reference can be made to the Trial Chambers in both the ICTR and ICTY who have dealt with this issue of undue delay in many decisions. In addition, the Appeals Chamber for these tribunals has in some

[8] *Id.*, para 7.

leading cases namely *Kovacevic*[9], *Karemera*[10] and most recently in *Bizimungu*[11] established international criminal jurisprudence about such matters and henceforth provided useful guidance and assistance as to how to proceed with such assessment and which factors a Trial Chamber must consider to arrive at a proper determination of undue delay.

10. In the *Bizimungu* Decision, the Appeals Chamber said:

> [...] the Trial Chamber must consider all of the circumstances bearing on a motion to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance. The Appeals Chamber stated in Karemera that a "postponement of the trial date and a prolongation of the pretrial detention of the Accused" are "some, but not all" of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay," which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules. The Trial Chamber should also consider such factors as the nature and scope of the proposed amendments, whether the Prosecution was diligent in pursuing its investigations and in presenting the motion, whether the Accused and the Trial Chamber had prior notice of the Prosecution's intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the Prosecution seeks an improper tactical advantage, and whether the addition of specific allegations will actually improve the ability of the Accused to respond to the case against them and thereby enhance the overall fairness of the trial. Likewise, the Trial Chamber must also consider the risk of prejudice to the Accused to recall witness for cross-examination. The above list is not exhaustive; particular cases may present different circumstances that also bear on the proposed amendments.[12]

11. In the *Kovacevic* Decision, and most specifically in the *Karemera* Decision, the Appeals Chamber had this say about "delay":

> 13. [...] This factor arises from Article 20(4)(c) of the Statute of the International Tribunal, which entitles all accused before the International Tribunal to be "tried without undue delay," and is unquestionably an appropriate factor to consider in determining whether to

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[9] *Prosecutor v. Kovacevic*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998 ("*Kovacevic* Decision").
[10] *Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 12 December 2003 ("*Karemera* Decision").
[11] *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka & Mugirareza*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("*Bizimungu* Decision").
[12] *Id.*, para. 16.

grant leave to amend an indictment. Guidance in interpreting Article 20(4)(c) can be found in the ICTY case of *Prosecutor v. Kovacevic*, in which the Trial Chamber refused amendment of an indictment on grounds that included undue delay. The ICTY Appeals Chamber framed the question as "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in light of the right of the accused to a fair and expeditious trial." The ICTY expresses in language identical to Article 20(4)(c) of the Statute of International Tribunal, "must be interpreted according to the special features of each case." Additionally, the specific guarantee against undue delay is one of several guarantees that make up the general requirement of a fair hearing, which is expressed in Article 20(2) of the Statute of the International Tribunal and Article 21(2) of the ICTY Statute. "[T]he timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings."

14. *Kovacevic* stands for the principle that the right of an accused to an expeditious trial under Article 20(4)(c) turns on the circumstances of the particular case and is a facet of the right to a fair trial. This Appeals Chamber made a similar point recently when it stated, albeit in a different context, that "[s]peed, in the sense of expeditiousness, is an element of an equitable trial." Trial Chambers of the International Tribunal have also used case-specific analysis similar to that of *Kovacevic* in determining whether proposed amendments to an indictment will case "undue delay."[13]

12. For the purpose of this discussion it should be observed that article 17(4) of the Statute of the Special Court is essentially to the same effect and reads in part:

> "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:
>
> [...];
>
> (c) To be tried without undue delay;"

13. Therefore, decisions of the Appeals Chamber for ICTY on such matters, could find full application and be of useful guidance to this Trial Chamber when dealing with such issues

[13] *Karemera* Decision, supra note 10, paras 13-14.

and this will all due respect to the contrary views expressed on this subject by my Brother Judge Thompson in his dissenting opinions in the AFRC and RUF Decisions.[14]

14. Based upon the foregoing decisions I accept that such "case-specific analysis similar to that of *Kovacevic* is a proper method for the determination of whether proposed amendments to an indictment will cause undue delay" and furthermore, in the words of the Appeals Chamber in the *Karemera* Decision, also to determine "whether the additional time which the granting of the motion for leave to amend is reasonable in light of the right of the accused to a fair and expeditious trial."[15] It is in that perspective that the case-specific analysis is to be applied to measure "the timeliness of the Prosecutor's request for leave to amend the indictment."[16]

15. With regards to timeliness, based upon the foregoing analysis, the questions to be answered when considering this matter in the existing circumstances are two-fold:

    (a) Whether the Prosecution could or should have filed such a request for an amendment much earlier in the process;

    (b) Would such an application at this particular time when the Trial has not yet started but where the Court is about to begin the trial cause an undue delay and consequently violate the right of the accused to a fair and expeditious trial.

Prosecutor's Exercise of Discretion

16. To properly answer this first question, it is necessary to examine what are the duties, obligations and responsibilities of the Prosecutor when proffering charges against an accused person. Would "*indicia*" of evidence be sufficient to justify such actions on the part of the Prosecution or is there a requirement of sufficiency of evidence to provide reasonable grounds for believing that a suspect has committed a crime in the jurisdiction of the court before making such a decision?

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[14] *Prosecutor v. Alex Tamba Brima et al.*, 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, 6 May 2004, paras 5-6; and *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-14-PT, Dissenting Opinion of Judge Bankole Thompson, Presiding Judge of the Trial Chamber on Prosecution's Motion for Leave to Amend Indictment against Accused Issa Hassan Sesay, Morris Kallon and Augustine Gbao, 6 May 2004, paras 5-6.

[15] See supra para. 11.

[16] *Id.*

17. In disposing of a motion as to jurisdiction in the *Fofana* case this Chamber while discussing the process applicable when reviewing an application for approval of an indictment, commented on the applicable test in the following terms:

> 32. The review of an indictment is not simply a "rubber stamp" procedure; rather, it is a process during which the Designated Judge carefully reviews the contents of the proposed indictment and Prosecutor's case summary to determine whether there is sufficient information to establish reasonable grounds to believe that the person committed the crime charged.
>
> 33. The Chamber recalls that Rule 47 of the Rules was amended at the Plenary in March 2003: Rule 47(B) had been identical to that of the ICTR Rules. This amendment does not mean, however, that the Chamber abandoned the general principle of criminal law that there must be a sufficient basis for each crime charged.[17]

18. Reference was made in that decision to The Code for Crown Prosecutors[18] for England and Wales which provides in Articles 5(1), 5(2) and 5(3) that:

> 5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge;
>
> 5.2 A realistic prospect of conviction is an objective test;
>
> 5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable.

19. A cursory review of case law in some national jurisdictions as to the duties, obligations and responsibilities of the Prosecution when determining to proceed with charges against an accused person does provide some insightful appreciation of what in common law jurisdictions is generally considered to be the duty of a Prosecutor.

20. Of interest for our purposes some of the comments of Judge Shahabuddeen in his separate opinion in the *Kovacevic* Decision where he states:

> "[...] I take the prevailing common law position to be set out in a 1977 opinion of the United States Supreme Court, delivered by Mr. Justice Marshall and reading in parts as follows:

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[17] Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 May 2004, paras. 32-33.
[18] Available at <www.cps.gov.uk>.

> The Due Process Clause does not permit courts to abort criminal proceedings simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process", to impose on law enforcement officials our 'persona; and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function'. ... Our task is more circumscribed. We are to determine only whether the action complained of -here, compelling respondent to stand trial after the Government delayed indictment to investigate further - violates ... 'fundamental conceptions of justice ...' which define 'the community's sense of fair play and decency' ...". (United States v. Lavasco, 431 U.S. 783 (1977), at p. 790)."
>
> "It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt...". (Ibid., p. 791).
>
> "In our view, investigative delay is fundamentally unlike delay undertaken by the government solely 'to gain tactical advantage over the accused', ... precisely because investigative delay is not one-sided. Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed' ... This the Due Process Clause does not require". (ibid., p. 795).[19]

21. Although dealing with different matters but having to consider the duty of prosecuting authorities when acting in criminal matters, the Supreme Court of Canada in *Proulx v. The Attorney General of Quebec* stated the following:

> "the Crown must have sufficient evidence to believe that guilt *could* properly be proved beyond a reasonable doubt before reasonable and probable cause exists, and criminal proceedings can be initiated. A lower threshold for initiating prosecutions would be incompatible with the prosecutor's role as a public officer charged with ensuring justice is respected and pursued."[20]

22. In *R. v. Regan*, the same court said:

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[19] *Kovacevic* Decision, supra note 9, Separate Opinion of Judge Mohamed Shahabuddeen.
[20] *Proulx v. Quebec (Attorney General), 3 S.C.R. 9, 2001, para. 31.*

> "There is no question ... that the principles of fairness and fundamental justice entitle an accused to a duty of objectivity exercised by the Crown in deciding to prosecute" [21]

23. And in *Boucher v. The Queen*, Judge Rand stated for the Court:

> "Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. [...] his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of the judicial proceedings."[22]

24. Based upon the foregoing and considering the description enunciated in the "Background" section above as to the burden of proof and autonomy of the Prosecutor, I have to conclude therefore, in response to the first question, that it is only when the Prosecutor has what he considers to be sufficient, credible evidence that can be used and is relevant to what he is alleging that he should proceed to bring an indictment for approval by the Court. Although we are proceeding here with amendments to the consolidated indictment and there are no specific requirements in the rules as to any applicable test or criteria to be applied by the Prosecutor, in my view, the very same test of 'reasonable certainty of conviction' that was required at the earlier stages of the process is applicable here to these new counts.

25. When dealing with sufficiency of evidence, due process requires a Prosecutor to act fairly, with objectivity and decency. In my opinion, in the discharge of its statutory obligation, pursuant to Article 15 of the Statute of the Special Court, therefore the Prosecutor can only bring a charge against an accused if the evidence meets this test of "reasonable certainty of conviction'. The evidence must be such that it would provide reasonable grounds for believing that a person has committed a crime within the jurisdiction of the Court. He must be in possession of evidence sufficient to reasonably be satisfied that he could get a conviction should he proceed ahead with a count or a new count as the case may be. Failing to meet this objective test, a Prosecutor cannot proceed to bring a count for approval or application for amendment of an existing indictment for the addition of new counts.

Gender-Based Crimes

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[21] *R v. Regan*, 1 S.C.R. 297, 2002, para. 124.
[22] *Bouchrt v. The Queen*, S.C.R. 16, 1955, p. 23-24.

26. Another feature with reference to these new counts that deserves careful consideration when assessing 'timeliness' and for that purpose in determining the vigilance, diligence and attention of the Prosecution in the investigative process relates to the very nature of these offences. When dealing with gender-based crimes a special consideration should be brought to bear in the appreciation of the circumstances. It is now quite widely recognized and accepted that victims of sexual violence will often demonstrate reluctance to come forward and report such actions. Studies, surveys, reports about the effects of gender-based violence on victims demonstrate the difficulty of investigating and gaining evidence about such crimes and the reluctance of victims to discuss these matters.

27. A report authored by Charlotte Lindsey for the International Committee of the Red Cross with respect to sexual violence during war and its effect on women highlight these difficulties. The report in its summary at pages 51-65 provides the following:

> "Women may be unable or afraid to report such violations because national institutions have broken down or because doing so may endanger women further. In many cultures, the "shame" associated with rape is in a social sense perceived as even worse than the physical act itself.
>
> Survivors of rape or sexual violence may face further problems such as ostracism or retribution (in addition, the perpetrators may have told them that if they report the violation they, or their families, will be subjected to further violence).
>
> Women who have been subjected to violence, including sexual violence, need to assess for themselves what constitutes justice, and may not necessarily want to give evidence in criminal proceedings because they do not wish their family to know what happened to them, or because of fears for their own safety and that of their family, and/or because of desire not to live through the ordeal again by retelling it."[23]

28. To essentially the same effect, in the preliminary report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflicts, these comments can be found :

> "It is clear from the material gathered in this preliminary report that there exists a very substantial body of international law relating to systematic rape, sexual slavery and slavery-like practices during wartime, including internal armed conflict. [...] there is preliminary

[23] Charlotte Lindsey, Women Facing War, ICRC, Geneva, October 2001.

information about the widespread occurrence of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict [...]"

"The victims of these atrocities should be treated at all times with respect and understanding. All agencies and mechanisms dealing with human rights and humanitarian issues should be mindful of the perspective of victims of systematic rape and sexual abuse, and of the fact that victims suffer long-term consequences. A further possibility for study is the silence of victims. Reasons for reluctance to report wartime rape may include shame and social stigma, fear of awakening bad memories, fear of reprisals, a lack of trust in the judicial system and the national legislature, and the belief in the absence of remedies."[24]

29. The Report of the Secretary-General "Rape and abuse of women in the areas of armed conflict in the former Yugoslavia" describes such reluctance of victims as follows:

"It must be remembered, however, that reports of sexual assault are difficult to obtain given the reluctance of victims to describe such experiences since they implicitly carry with them prospects of social stigma and fear of reprisals."[25]

30. And in "Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000)":

"Many societies blame the victim of sexual violence, particularly when the victim is a woman or a girl. The resulting social rejection reinforces feelings of shame, guilt, loneliness and depression. Victims of gender-based violence may feel overcome with terror, experience a sense of powerlessness, worthlessness, apathy and denial. In some societies, the stigma attached to sexual violation leads to ostracism and isolation. Husbands or families may shun women or girls who acknowledge that they were raped. Ostracism may also occur in societies that maintain certain myths about survivors of sexual violence, such as in Sierra Leone, where it is believed that raped women and adolescent girls will become barren, sexually obsessed, and unable to remain faithful to their husbands."[26]

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[24] UN Doc. E/CN.4/Sub.2/1996/26, Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices During Periods of Armed Conflict, Ms. Linda Chavez, 16 July 1996, paras 86-87.
[25] UN Doc. A/52/497, Report of the Secretary General, Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives, Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, 17 October 1997, para. 20.
[26] Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000), para. 79.

31. In addition to these reports, many academic commentators such as Christine Chinkin have expressed similar views: victims of sexual violence experience a great deal of shame associated with rape:

> "The consequences of rape continue beyond the actual attack or attacks, often lasting for the rest of the women's lives. As well as the degradation, pain and terror caused at the time, the fear engendered remains long after... Women fear they have become unacceptable to their families and communities, a fear which may be enhanced where the rape was committed publicly in the presence of members of these communities. Public rape terrorizes and traumatizes the civilian population. There is also only just beginning to be some understanding of the psychological damage caused by the trauma of violent sexual abuse."[27]

32. International criminal tribunals have expressed comments as to this particular situation and the enduring effect it has on these victims. In the *Delalic* case, Trial Chamber of the ICTY stated:

> "The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting."[28]

33. And finally, to conclude on this aspect, I would like to refer to the *Ayakesu* case at the ICTR where the Trial Court noted that the Prosecutor had stated that the "evidence previously available was not sufficient to link the Accused to acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence."[29]

Conclusion

34. The record shows that at the time when the indictment for each of these accused now joined as the CDF Group, was submitted to the Court for approval, the latest one being on 30 June 2003, it did not include any count related to gender-based crimes and/or sexual violence contrary to what had been done with reference to all accused in the RUF Group and those of the AFRC Group. However there is no evidence that suggest that any adverse inference

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[27] Christine Chinkin, Rape and Sexual Abuse of Women in International Law, 5 European Journal of International Law (1994), p. 326.
[28] *Prosecutor v. Delacic et al.*, IT_96-21-T, Judgement, para 495.
[29] *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on Prosecutor's Request for Leave to Amend the Indictment, 17 June 1997, para. 417.

should be drawn from these facts. The only conclusion should be, in my view, that in the circumstances that existed there was sufficient evidence at that time that did justify that it be proceeded with, as the Prosecution did with respect to these two groups, AFRC and RUF, and no such evidence was available about this other group, the CDF. the circumstances were just different.

35. The information and the material submitted to the Court reveal that there were however some indication about gender-based crimes that came to the knowledge of the Prosecution shortly after the indictment was submitted to the Court for approval, that being at the end of June 2003. However, it would appear that it was not "until October 2003 that solid evidence capable of confirmation was obtained"[30] and "the earliest...the amendments could have been filed was late November in that the evidence relating to the gender-related crimes was only properly confirmed and ready for charging at that time."[31] "The lapse of time between the discovery of the sexual violence evidence and the filing of the amendment was due to the need to properly evaluate and confirm the evidence. In addition, the Prosecution had to secure the full cooperation of the witness who were going to testify to these allegations before the amendment could be filed."[32]

36. Considering the foregoing description of facts, I am lead to conclude that the Prosecutor did not have at the time the indictments were submitted for approval sufficient evidence that would have justified him to proceed with such counts related to gender-based crimes.

37. Considering the test of reasonable certainty of conviction applicable to the Prosecutor in the proper exercise of its statutory obligation pursuant to Article 15 of the Statute in light of the evidence and material available to the Court, I find that sufficient evidence only existed at the end of November 2003. Consequently, to answer the question posed earlier, I conclude that in law and in fact only at that time could the Prosecutor have filed an application for such amendments to add these new counts of gender-based crimes. I also find that the Prosecution does not by filing this leave to amend at this stage of the process seek any improper tactical advantage.

38. Now with respect to the second question, considering the existing circumstances, I would conclude that by granting such an application, it would not cause any 'undue delay'. Given

[30] Prosecutor's written answers, para.2.
[31] *Id.*, para. 7.
[32] *Id.*, para 2.

that the trial of the accused will be alternating, on a monthly basis with another trial I am not even convinced that by granting this application, it would of necessity produce a real delay. Bearing in mind all the existing circumstances, even though there might be a delay, such delay will not in my opinion amount to a violation of the accused right to be tried without undue delay.

39. As to the other counts where the Prosecutor is seeking leave to extend the time and location, again considering the facts and the materials submitted in support of this application, applying the test previously described as to the proper exercise of prosecution discretion, in law and in fact.

40. To paraphrase the Trial Chamber in *Kabiligi*, I find that "the proposed amendment, if granted, will not cause any prejudice to the accused which cannot be cured by the provisions of the rules."[33]

41. For all of these reasons, I would allow such amendments and would grant leave to amend these counts accordingly.

Done at Freetown this 31st day of May 2004

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]

[33] *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999, para. 51.