170) SCSL-2004-14-T (8862-8876) 8863

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before:	Hon. Judge Benjamin Mutanga Itoe, Presiding Judge Hon. Judge Bankole Thompson Hon. Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	2 August 2004

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

MAJORITY DECISION ON THE PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION'S REQUEST FOR LEAVE TO AMEND THE INDICTMENT AGAINST SAMUEL HINGA NORMAN, MOININA FOFANA AND ALLIEU KONDEWA

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Luc Côté
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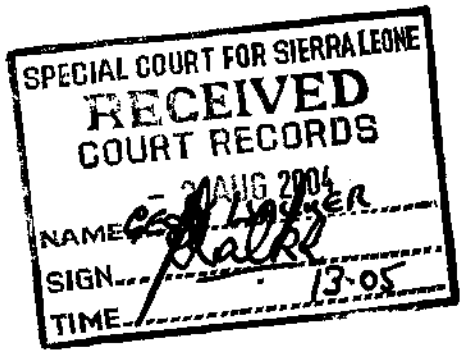
Standby Counsel for Sam Hinga Norman:
Bu-Buakei Jabbi

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 Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson and Hon. Judge Pierre Boutet;

NOTING the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, rendered on 20 May 2004 ("Decision");

SEIZED of the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa ("Application") filed by the Office of the Prosecutor ("Prosecution") on 4 June 2004;

NOTING the Joint Response to the Application filed by Defence Counsel for Moinina Fofana and Allieu Kondewa on 14 June 2004 ("Joint Response");[1]

NOTING the Reply to the Joint Response filed by the Prosecution on 18 June 2004 ("Reply");[2]

NOTING THE SUBMISSIONS OF THE PARTIES

A. The Prosecution's Application

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules"), the Prosecution seeks leave to appeal against the Decision of this Chamber refusing the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Alieu Kondewa on the basis of exceptional circumstances and irreparable prejudice.

2. On the issue of exceptional circumstance, the Prosecution submits that the different opinions expressed by the judges in the majority decision and the dissenting opinion amount

[1] Joint Response of Second and Third Accused to Prosecution's Application for Leave to Appeal against the Decision on Request for Leave to Amend the Indictment.
[2] Prosecution Reply to Defence Joint Response to Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on Request for Leave to Amend the Indictment.

to exceptional circumstances, as this fact illustrates the difficult legal and factual issues raised by the Request to Amend the Indictment. [3]

3. The Prosecution further submits that it is obliged to prosecute to the "full extent of the law", which it could not do if the Decision denying leave to amend the indictment was allowed to stand. It argues that the high profile nature of gender based crimes under international law constitutes another exceptional circumstance.[4]

4. The Prosecution also states that, as a consequence of the denial Decision, the possibility of undermining the objectives of the Special Court exists, as the Prosecution is unable to establish a complete and accurate historical record of the crimes committed during the armed conflict in Sierra Leone and cannot acknowledge the right of the victims to have crimes committed against them characterized as gender based crimes.[5]

5. As regards irreparable prejudice, the Prosecution submits that although validated by the evidence in its possession, the Decision causes irreparable prejudice to the Prosecution as it precludes the Prosecution from prosecuting sexual violence acts committed by CDF members.[6]

6. It contends further that the denial of the amendment sought also precludes the victims from having their crimes characterised as gender based crimes and impairs the remedies to which they are entitled[7], and that denying the amendment establishes impunity with respect to gender crimes, as it is highly improbable that they will ever be prosecuted under domestic jurisdiction for such crimes.[8]

7. It is also the Prosecution's submission that an appeal will not create a delay of the proceedings, as the next session in the CDF-case will start in September only, giving the Appeals Chamber sufficient time to decide on this matter. If the amendment is granted, the Prosecution contends, the Trial Chamber is free to order that evidence pertaining to gender

[3] Motion, para. 4.
[4] *Id.*, para. 5
[5] *Id.*, para. 6.
[6] *Id.*, para. 7.
[7] *Id.*, para. 8.
[8] *Id.*, para. 9.

based crimes be presented towards the end of the Prosecution's case, giving the Defence more than six months to prepare the cross examination of Prosecution witnesses.[9]

8. If granted leave to appeal, the Prosecution submits that it will argue that the Trial Chamber erred on various points. It asserts that contrary to the Decision by the Trial Chamber, the full investigations did not start two years ago,[10] but only in November 2002. Information obtained by the Prosecution prior to October 2003 were only indications of gender based crimes. In addition, the Prosecution submits that by assuming that the Prosecution had acted without due diligence in the conduct of its investigations of gender based crimes the Trial Chamber erred, as well. According to the Prosecution, obtaining evidence on gender based crimes necessitates much more time than collecting evidence concerning other crimes, especially regarding CDF victims because of the popular support for CDF.[11]

9. In conclusion, the Prosecution submits that the Trial Chamber misdirected itself as to the principle to be applied, when it held that "the rules relating to the detection and prosecution of these [gender based] offences are the same as those governing the other war crimes and international humanitarian offences", and agrees with the view expressed by Judge Boutet in his Dissenting Opinion on the Decision, that the detection of evidence relating to gender crimes requires much more time and vigilance than the detection of other crimes.[12]

B. The Defence Response

10. The Defence argues that a dissenting opinion does not constitute exceptional circumstances, as the practice of appending dissenting opinions at international tribunals is standard.[13] It further argues that there is no obligation on the Prosecution to prosecute to "the full extent of the law", and that if such an obligation really existed, the negotiation of plea agreements would not be possible before international criminal tribunals.[14]

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[9] *Id.*, para 10.
[10] At the time of the filing of the motion this meant February 2002.
[11] *Id.*, para. 2
[12] *Id.*, para. 18.
[13] Response, para. 8.
[14] *Id.*, para. 10.

11. The Defence Counsel for the 2nd and 3rd Accused submit that an argument that has been raised in the original motion cannot amount to irreparable prejudice, since the Trial Chamber will have weighed the argument in its decision.[15] In addition, it is the contention of the Defence that as the victims are not a party to the case, alleged impairment of victims' remedies does not constitute "irreparable prejudice to a party", as required by Rule 73(B).[16]

12. The Defence also submits that the Prosecution fails to present evidence in support of the distinction between the difficulties encountered in investigating alleged CDF gender-based crimes and those in RUF and AFRC [17], and the Defence stresses the fact that the Application for leave to amend the indictment was not timely filed, as this should have been done in October 2003.[18]

C. Prosecution's Reply

13. In the reply, the Prosecution submits the contrary to the Defence Response, dissenting opinions to decisions on leave to amend an indictment have never happened at the ICTR and ICTY. The dissenting opinion shows the complexity of this issue which would benefit from a review by the Appeals Chamber. [19]

14. The Prosecution stresses that it is indeed obligated to prosecute to the "full extent of the law", as established by decision of the ICTY and the ICTR[20] and that the possibility of plea bargaining does not nullify this obligation, and under international criminal law, a plea agreement operates only after the presentation of an Indictment which properly reflects the totality of the crimes allegedly committed by the Accused.[21]

15. Furthermore, the Prosecution submits that because of the different tests for the leave to amend an indictment and the leave to appeal a decision, an argument can be raised again if it proves the fulfilment of the peculiar conditions of Rule 73(B)[22], and reiterates that the

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[15] *Id.*, para. 13.
[16] Id., para. 15.
[17] *Id.*, para. 25.
[18] *Id.*, para. 27.
[19] Reply, para. 3.
[20] *Prosecutor v Mladen Naletilic and Vinko Martinovic*; IT-98-34-PT, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment; *Prosecutor v Alfred Musema*, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, para. 17.
[21] Reply, para. 4.
[22] *Id*, para. 5.

objective of the Special Court to promote justice and reconciliation in Sierra Leone will not be met if the victims are not at the heart of the Court's efforts.[23]

16. It also re-emphasises that the difficulties encountered in investigating CDF gender-based crimes are greater than for AFRC/RUF crimes due to the security risks faced by witnesses testifying against CDF members, submitts that the specific security risk for CDF witnesses was also acknowledged by this Chamber in its Decision on Protective Measures.[24]

17. In conclusion, the Prosecution reiterates that in May 2003 there were only indications of sexual violence, and cites as an example of such indications the following paragraph from a witness statement of this period:

"The only rule was that at 7 a.m. you had to meet them at the field at Base Zero, but during the night you could do what you want. Girls came from surrounding villages into base Zero, plenty of them. This was the only safe place in Talia. I know there was plenty of Gonnorea [sic] around there."[25]

HAVING DELIBERATED THE CHAMBER DECIDES AS FOLLOWS:

Introduction

18. This is an application by the Office of the Prosecutor seeking leave to file an interlocutory appeal.

Order Requested

19. Specifically, the Prosecution seeks leave of the Chamber to file an interlocutory appeal against the Chamber's Decision on the Prosecutor's request for leave to amend the indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa.

Legal Basis for the Application

20. The Prosecution's application is filed pursuant to Rule 73(B) of the Rules. According to Rule 73(B):

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[23] *Id.*, para. 6
[24] *Id.*, para. 10.
[25] *Id.*, para. 11.

> "Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders."

Applicable Jurisprudence

21. In its most recent Decision[26] on the issue of interlocutory appeals where the Prosecution sought leave of the Trial Chamber to appeal interlocutorily against its Decision on the Motion for Concurrent Hearing of Evidence Common to cases SCSL-2004-15-PT and SCSL-2004-16-PT, the Chamber had cause to refer to one of its seminal decisions on the subject, to wit, the *Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Motion for Joinder.*[27] The Chamber noted that the Decision laid down the principles governing applications for leave to file interlocutory appeals. In that Decision, the Chamber stated emphatically that Rule 73(B) generally does not create a right to appeal against an interlocutory decision but renders it permissible only where leave is granted in exceptional circumstances. The Chamber cited with approval two passages from that Decision as representing the existing law on the subject. The first passage reads as follows:

> "As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied."[28]

22. Suffice it to note that the Chamber sees no compelling reason, at this point in time, to depart from or modify the foregoing statement of the law especially in the interest of logical consistency and certainty in its evolving jurisprudence, but to determine every application for leave on the basis of the law as recently expounded, and more importantly, on a case by case basis.

23. In the second passage, the Chamber explained the rationale behind Rule 73(B). The Chamber reasoned as follows:

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[26] Decision on Prosecution Application For Leave to file An Interlocutory Appeal against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004.
[27] 13 February 2004 ("Decision of 13 February 2004").
[28] *Id.* para. 10.

> "This interpretation is unavoidable, given the fact that the second limb of Rule 73(B) was added by the way of an amendment adopted at the August 2003 Plenary. This is underscored by the fact that prior to that amendment no possibility of an interlocutory appeal existed and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision."

24. Indeed, in its most recent Decision under reference[29], the Chamber reinforced the restrictive nature of Rule 73(B) with the terse observation that:

> "The overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals."[30]

25. At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so, to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B). We are however not suggesting here that the Chamber will remain indifferent to an application where deserving and meritorious grounds that meet the test laid down in Rule 73(B) have been advanced by the party seeking leave to file an interlocutory appeal.

Evaluation of the Application's Merit

26. As to the merits of the Application the Chamber recalls that the Prosecution's case in support of the "exceptional circumstances" prong of the test rests, firstly on the belief, as stated by the Prosecution,

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[29] Decision on Prosecution Application for Leave to file an interlocutory appeal against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004 ("Decision on Concurrent Hearing of Evidence")
[30] *Id.*, para. 21.

"that the different opinions expressed by the majority and dissenting opinion in the Decision, illustrates that the legal and factual issues raised by the Request to amend the Indictment are difficult ones that would benefit from the review of the Appeals Chamber."

27. In this regard, it is submitted by the Prosecution that a strong and articulate dissenting opinion by a member of the Trial Chamber may itself constitute the exceptional circumstance warranting the granting of the application. Although this proposition sounds interesting and novel, the Prosecution has failed to elaborate on it thereby leaving the Chamber with no option but to observe that such a view is neither supported by case-law authority nor is it grounded on any legal foundation.

28. It would, in our opinion, be erroneous to hold that every legal situation or variable which appears to be novel or unique should, for that reason, qualify as "exceptional circumstances" within the meaning of Rule 73(B). We would only want to observe in this regard, that disagreements amongst Judges on some of the multi-faceted legal and factual issues which constitute the core of legal disputes is a normal judicial feature that is inherent in the exercise by the Judges of judicial independence on which the administration of justice is, and will continue to be, based.

29. The second key submission put forward by the Prosecution is that the high profile nature of gender based crimes under international law constitutes an exceptional circumstance given its statutory duty "*to prosecute to the full extent of the law and to present before the court all relevant evidence reflecting the totality of crimes committed by the Accused*". In the Chamber's view, the fact that the counts sought to be incorporated in the Indictment by the way of the amendment are gender based crimes, cannot be the sole determinant or overriding variable in working out the "exceptional circumstances" equation as to whether or not to grant leave to appeal nor does the fact of the recognition of a prosecutorial statutory obligation to prosecute "to the full extent of the law" become the paramount consideration in any such equation, given the widespread recognition nationally and internationally, of the discretionary power enjoyed by the prosecutor not to prosecute even where there is evidence to justify the institution of criminal proceedings that could, under the Agreement and the Statute, possibly be included in the indictment.

30. By contending that the Office of the Prosecutor is obliged to prosecute "to the full extent of the law" is the Prosecution implying that it is obliged to prosecute all crimes for which there may be supporting evidence? By analogy, such an argument loses any legal cogency, if any, it may claim when applied to the exercise of the broad prosecutorial discretion in determining whether, in the context of prosecuting "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996", the indictments preferred on the one hand reflect the totality of all offences and on the other hand, all the perpetrators alleged to have committed such grave crimes against humanity. It may be pertinent, in this regard, to ask the following question: *On what grounds or principle, should the prosecutorial duty to prosecute to "the full extent of the law" be limited in application to the range of alleged criminality involved but not the range of the alleged perpetrators?* In our opinion, the overall interests of justice are not served by such limitations or differentiation in the exercise of the prosecutorial discretion.

31. Equally untenable, in the Chamber's considered judgement, is the Prosecution's contention that the Court is mandated to establish a complete and historical record of crimes committed during the armed conflict in Sierra Leone. This is a misconception. The Chamber's view is that the Court's role is exclusively adversarial in terms of meting out justice to victims and persons found guilty of serious violations of humanitarian law and Sierra Leone law during the said conflict. The alleged mandate which the Prosecution attributes to the Court, of providing a complete and historical record of what happened in Sierra Leone during the said conflict is erroneous as it is neither borne out nor is it so stipulated in either the provisions of the Agreement setting up the Special Court or in its Statute.

32. Furthermore, the Prosecution's argument that no delay would be occasioned in the conduct of the trial if the application were granted and the matter heard by the Appeals Chamber is highly speculative. Given the limited judicial life span of the Court, and the proliferation of requests from diverse international bodies for weekly summaries of the conduct of the trial so as to evaluate the court's commitment to expeditiousness, the Chamber takes the view that it is too tenuous a submission to warrant any merit in the context of the instant application. This Chamber has had the benefit of recent lessons about the shortcomings of a

reliance on the doctrine of rationalisation of factors which are likely to delay or not to delay trials as these are not matters that can be evaluated with any degree of exactitude and certainty.

33. We would like to re-emphasise that the test applicable by this Tribunal in considering applications for leave to file interlocutory appeals "is more restrictive in comparison with that applied by the International Criminal Tribunal for Rwanda and the International Tribunal for former Yugoslavia and to state that in the interests of expeditiousness and the peculiar circumstances of this Court's limited mandate"[31]. Based on the foregoing analysis and considerations, this Trial Chamber is not persuaded that the Prosecution's case for leave to file an interlocutory appeal against the Decision of the Chamber dated 20th of May, 2004, refusing leave to amend the Indictment of the CDF group of indictees does not rise up to the level of exceptional circumstances as required by the first prong of the Rule 73(B) test. The claim of "exceptional circumstances" by the Prosecution is legally unsustainable, and therefore fails.

The Element of Estoppel

34. Even though we are not obliged judicially to examine, the alleged "irreparable prejudice" submission of the Prosecution having found no showing of "exceptional circumstances", as the first prong of the conjunctive test, yet we take the liberty of observing that it is the Prosecution in this application, which is seeking leave to appeal against our majority interlocutory Decision, refusing leave to amend the Consolidated Indictment by adding new counts to it. For it to succeed, the Prosecution, as we have said, must satisfy us, as stipulated in the provisions of Rule 73(B) of the Rules, that exceptional circumstances exist for making such an application and that if it were not granted, it would suffer an irreparable prejudice.

35. For the Prosecution to be successful in establishing the conjunctive elements of exceptional circumstances and irreparable prejudice, it must, in our opinion, demonstrate that its conduct did not contribute to occasioning or causing the irreparable prejudice, if any, which forms the basis of the instant application for leave to appeal.

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[31] Decision on Concurrent Hearing of Evidence, *supra* note 29, para. 22.

36. In this regard, it is our conviction and finding, that the Prosecution, because of its neglect in respecting the statutory obligation of timeliness, both in instituting criminal proceedings or seeking leave for an amendment to the indictment at the appropriate time, particularly in the peculiar circumstances of the limited mandate of the Special Court, was solely responsible for the refusal by the majority decision of the Chamber, of the Application for leave to amend the indictment.

37. Indeed, our analyses in our majority judgement of the 29th of May, 2004, as illustrated by the following excerpts clearly demonstrate the aforementioned lapses on the part of the prosecution.

> "...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..."[32]

> "...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..."[33]

> "...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

[32] *Id.*, para. 42.
[33] *Id.*, para. 43.

outcome of the joinder motions and to file for the amendment after the decision on the joinder..."[34]

"...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...?"[35]

"...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..."[36]

"...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..."[37]

"...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..."[38]

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[34] *Id.*, para. 47.
[35] *Id.*, para. 48.
[36] *Id.*, para. 64.
[37] *Id.*, para. 76.
[38] *Id.*, para. 77.

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 5 August 2004

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

DISSENTING OPINION OF JUDGE PIERRE BOUTET ON DECISION ON THE PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION'S REQUEST FOR LEAVE TO AMEND THE INDICTMENT AGAINST SAMUEL HINGA NORMAN, MOININA FOFANA AND ALLIEU KONDEWA

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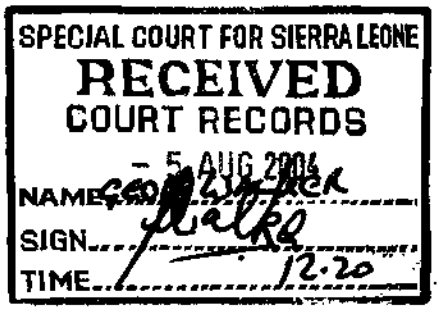

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1. With due respect for my Learned Brothers, Judge Benjamin Mutanga Itoe and Judge Bankole Thompson, I cannot agree with their analysis nor can I agree with their findings and disposition of this Application and therefore append this Dissenting Opinion.

INTRODUCTION

2. This Opinion concerns an Application filed by the Prosecution with the Trial Chamber seeking leave to appeal a Majority Decision of the Trial Chamber that denied the Application by the Prosecution for leave to amend the Consolidated Indictment. In dealing with such matters it is my view that a Trial Chamber is precluded from considering the merit of the Decision whose findings leave to appeal is sought about and in exercising that discretion the Court must be governed by the law applicable which is found in the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

APPLICABLE LAW

3. Rule 73(B) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone ("Rules") provides that:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

4. When discussing the rationale behind Rule 73(B) in the *Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* ("Majority Decision"), the Majority relied on a passage from the *Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motion for Joinder*,[1] ("Joinder Decision") which states:

> This interpretation is unavoidable, given the fact that the second limb of Rule 73(B) was added by the way of an amendment adopted at the August 2003 Plenary. This is underscored by the fact that prior to that amendment no possibility of an interlocutory appeal existed and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.

[1] RUF, AFRC, 13 February 2004.

5. I would like to observe before proceeding any further that this passage quoted from the Joinder Decision by the Majority is not in my view an accurate statement of the law. According to Article 14 (1) of the Statute of the Special Court, the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ("ICTR") shall apply *mutatis mutandis* to the conduct of legal proceedings before the Special Court. Subsection (2) of this Rule provides that the Judges of the Special Court may amend these Rules or adopt additional Rules. Rule 73(B) of the ICTR Rules, at the time that the Statute of the Special Court came into force, stated that "Decisions rendered on such Motions are without Interlocutory Appeal". At the March 2003 Plenary, the Judges of the Special Court, recognising the need for a limited right of interlocutory appeal, under certain conditions, amended Rule 73(B) to provide leave to appeal from decisions on motions on the grounds that a decision would be in the interests of a fair and expeditious trial. Rule 73(B) was amended to state:

> Decisions rendered on such motions are without interlocutory appeal save where leave is granted by the Trial Chamber on the grounds that a decision would be in the interest of a fair and expeditious trial.

6. At the subsequent Plenary in August 2003, Rule 73(B) was further amended to impose a more restrictive approach to granting leave to appeal, and required the existence of exceptional circumstances and avoidance of irreparable prejudice to the party. It is notable that the ICTR also amended Rule 73(B) to allow for a right of interlocutory appeal, which currently states:

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[2]

7. Although, as stated, Rule 73(B) is a restrictive provision, it should not in my view be given such a limited interpretation that it would inevitably lead to never granting any leave provision, as this Rule would effectively be without purpose. A purposive interpretation of Rule 73(B), taking into account the restrictive nature of the Rule, must not and cannot be interpreted in such a way as to completely deny any real possibility of any leave to appeal regardless of the circumstances.

<u>Exceptional Circumstances and Irreparable Prejudice</u>

8. No definition is provided in the Rules as to the meaning of "exceptional circumstances" and "irreparable prejudice". The case law of this Court is at an early stage of its formation, and a

[2] 27 May 2003.

precedent for interpreting the meaning of these requirements is still developing. Some general assistance on interpretation of this Rule is given in two previous Decisions of the Trial Chamber, that applied Rule 73(B). In the Decision on the Concurrent Hearing of Evidence,[3] cited in the Majority Decision, the Trial Chamber states: "[a]s a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied".[4] Reinforcing the restrictive nature of Rule 73(B) the Trial Chamber further observed that:

> The overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.[5]

9. In interpreting the concept of "exceptional circumstances", the European Court of Human Rights has stated that it "is capable of being interpreted and applied in a wide variety of ways in the absence of a more precise statutory definition of the circumstances".[6] When applying the imprecise nature of this statutory concept, the ECHR found exceptional circumstances in situations where public safety may be affected,[7] and where there is a serious risk that the course of justice might be interfered with.[8]

10. Several of the Rules contained in the Rules of Procedure and Evidence of the ICTY and ICTR ("ICTY Rules" and "ICTR Rules" respectively) specify the requirement of showing "exceptional circumstances". For example, in the ICTY Rules, Rule 53 provides for non-disclosure to the public of documentation, Rule 64 provides for detention on remand, and Rule 69(A) provides for the protection of victims and witnesses, and all such Rules refer to a requirement of "exceptional circumstances". Within the ICTR Rules, Rule 69(A) on the protection of victims and witnesses, and Rule 50 on amendment of the indictment, require a showing of exceptional circumstances. In

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[3] Decision on Prosecution Application for Leave to File An Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004.
[4] Decision on Prosecution Application for Leave to File An Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004. See also Decision on Prosecutor's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motion for Joinder, 13 February 2004.
[5] *Id.*
[6] *H v. Belgium*, ECHR, 1/1986/99/147, 28 October 1987.
[7] *Clooth v. Belgium*, ECHR, 49/1990/240/311, 27 November 1991.
[8] *The Sunday Times*, ECHR, 29 March 1979.

previous versions of the ICTY and ICTR Rules, there was also a requirement that exceptional circumstances be shown for the granting of provisional release.[9] An analysis of the case law interpreting the concept of exceptional circumstances in relation to these Rules, leads us to conclude that the notion is dependant on the particular subject matter of the Rule and is assessed in the broader context of the interests of justice.[10]

11. The concept of "Irreparable Prejudice" has been considered by the International Court of Justice (ICJ) and the ECHR in the context of the risk of irreparable prejudice to rights in issue in judicial proceedings.[11] In a similar vein, the Supreme Court of Canada in the case of *R v. Carosella*, considered the rights of parties in the context of alleged irreparable prejudice to the "integrity of the judicial system".[12] In the ICJ cases, the concept is applied to preserve the rights of either party in a judicial proceeding,[13] and requires analysis of whether a breach of the rights at issue "might be capable of reparation by appropriate means".[14]

12. The notion of prejudice has been considered by the International Criminal Tribunals in various instances, for example, in the application of Rule 73(B) of the Rules. An earlier version of Rule 73(B)[15] of the ICTY Rules required a showing of "good cause" for granting an application for leave to appeal. In applying this Rule, the Trial Chamber of the ICTY considered whether a "Decision by the Trial Chamber appears to be vitiated by grave error which would cause substantial prejudice to the accused or be detrimental to the interests of justice".[16] Furthermore, a prior version of Rule 73(B) of the ICTY Rules, incorporated the concept of prejudice into the Rule:

> Decisions on motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave

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[9] Rule 65(B).

[10] See, for example, *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Provisional Release), 15 October 1996; *Prosecutor v. Delalic*, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 September 1996; *Prosecutor v. Kupreskic*, Decision on Defence Motion for Provisional Release, 15 May 1998; *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Form of the Indictment), 15 October 1996; *Prosecutor v. Rukundo*, Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request His Provisional Release, 18 August 2003.

[11] See *Nuclear Tests Case* [1973] ICJ REP. at 103, para. 20; *Continental Shelf* [1976] ICJ REP. 11, para. 32; *Rep. Congo v. Fr.*, Request for a Provisional Measure, ECHR, 17 June 2003.

[12] *R v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.).

[13] *Nuclear Tests Case* [1973] ICJ REP. at 103, para. 20.

[14] *Continental Shelf* [1976] ICJ REP. 11, para. 32.

[15] October/November 1997.

[16] *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Form of the Indictment), 15 October 1996. See also *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Provisional Release), 15 October 1996.

i. if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgment appeal; or
ii. if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally. (emphasis added)

13. This version of the Rule clearly links the concept of prejudice to a right of appeal, where there is an inability to cure such prejudice through the final dispositionl of the trial, including any post-judgment appeal.

14. Both the concept of "exceptional circumstances" and "irreparable prejudice" are to be considered in the light of the detriment caused to the interests of justice.

DISCUSSION

15. I will now proceed to set forth the reasons why I dissent from the Majority Decision in this case and hold that the Prosecution have met the criteria laid out in Rule 73(B) and should be granted leave to appeal the Decision of the Majority that determined leave to amend the Consolidated Indictment.

Exceptional Circumstances

16. Exceptional circumstances exist in this case for a number of reasons, and when assessed separately, or cumulatively, they reach the threshold of "exceptional circumstances". To begin, this is the first time in the case law of the International Tribunals, that a dissent has been given on a decision based upon a request for leave to amend an indictment. The fact that there is a dissent on a discretionary decision made by Majority Judges, supports the Prosecution's submissions that there are alleged errors in the exercise of the discretion of such Judges, and that of itself gives rise to exceptional circumstances and consequently grounds for granting this leave for interlocutory appeal. The fact of dissenting, in a number of jurisdictions, is a ground for appeal. In the Supreme Court Act of Canada, Section 691 (1) provides that "[a] person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada (a) on any question of law on which a judge of the court of appeal dissents". In Australia, the Judiciary Act of 1903 provides in Section 35A that:

> "[i]n considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to: [...] (ii) in respect of which a decision of the High Court, as the final

> appellate court, is required to resolve difference of opinion between different courts, or within the one court, as to the state of the law [...].

17. The fact that there is this Dissenting Decision of the Impugned Decision, in and of itself, in my opinion, constitutes in these circumstances sufficient grounds for granting leave to appeal in this case. In addition, the Prosecution, in their application for leave to appeal, have raised serious allegations of errors of mixed law and fact. They support their application by referring to the Dissenting Opinion of the Impugned Decision. Detailed analysis was provided in the Dissenting Opinion on issues that, *inter alia*, included undue delay, and the exercise of the Prosecutor's prosecutorial discretion. The Prosecution assert that the Majority Judges misdirected themselves on these issues, and the fact that there is a dissent on these issues, provides a basis for appeal. I would support this argument of the Prosecution and find that these alleged errors of mixed fact and law, when considered in conjunction with the *nature* of the Dissenting Opinion, gives rise to exceptional circumstances.

18. In reaching the Majority Decision on the request to amend the Indictment, the Judges exercised their discretion on a matter of fundamental significance to the integrity of the judicial system and the development of this Tribunal's jurisprudence. The request by the Prosecution to amend the Indictment concerned essentially serious charges of sexual violence against the Accused persons, in addition to alleged direct participation of the Accused in such crimes. It is my opinion that a failure to grant leave to appeal on such a fundamental issue could prejudice this Court's capacity, to fulfil its mandate outlined in Article 1(1) of the Statute, namely, "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law", a mandate founded on recognition by the United Nations Secretary General that sexual violence committed against girls and women was one of the most egregious practices committed during the armed conflict in Sierra Leone.[17] Victims of sexual violence have the right to have crimes that are committed against them prosecuted with all due respect to the Rule of Law. I consider these factors to constitute, in themselves, exceptional circumstances within the meaning of Rule 73(B) of the Rules in that not to do so in these circumstances would not be in the interests of justice.

Irreparable Prejudice

19. A fundamental feature of any Indictment is that it reflects the full criminal culpability of the Accused. In this case, the Prosecution allege that the Accused persons, through individual and

[17] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 12.

superior criminal responsibility, are responsible for grave crimes of sexual violence. Failure to allow leave to appeal the Impugned Decision, would cause irreparable prejudice to the Prosecution case and to the integrity of the judicial system and in the circumstances not in the interest of justice. As outlined above, the concept of irreparable prejudice refers to the inability to cure any prejudice suffered. Clearly, there would be no available remedy available to that party should this leave to appeal be denied.

20. Furthermore, failure to accurately represent the alleged acts committed by the Accused in the Indictment will result in serious prejudice to the Prosecution case and may affect the outcome of the trial. Such prejudice is irreparable and detrimental to the interests of justice. Such irreparable prejudice, in itself, constitutes exceptional circumstances.

Estoppel

21. I disagree with the Majority holding in its decision that the Prosecution was estopped from raising the issue of irreparable prejudice, where the Majority stated that:

> [I]n these circumstances, therefore, the Prosecution is now estopped from raising the issue of irreparable prejudice as this was occasioned the lack of diligence and promptitude on its part in carrying out investigations fro the gender crimes, which it rather belatedly wanted to incorporate into the consolidated indictment, coupled with the lack of respect for the principle of timeliness in seeking the amendment for a trial whose commencement was very imminent and which actually started on the 3 June 2004, after we rendered our decision which the Prosecution is contesting, on the 29 May 2004.

22. The doctrine of estoppel is a common law equity rule that both prevents parties from testifying or speaking to events that have already been legally decided and prohibits them from reasserting claims or rights that contradict their prior statements. The previously decided issues may be matters of fact or of law. The principle of estoppel is rooted in notions of consistency, good faith, equity, and public policy.[18] The international use of the docrine of estoppel draws most extensively on two types of common law estoppel doctrines, namely, equitable estoppel and estoppel by representation. Equitable estoppel is a defensive doctrine that prohibits one party from unfairly taking advantage of another party by means of misrepresentation. Estoppel by representation is similar to equitable estoppel and is invoked when one party makes a statement and this statement reasonably and detrimentally induces the other party to rely.[19] This doctrine is not directly, or by

[18] See Christopher Brown, "A Comparative and Critical Assessment of Estoppel in International Law", 50 U. Miami L. Rev. 369.

[19] See, for example, *Nuclear Tests (New Zealand v. France)*, 20 December 2974, International Court of Justice, para. 63; *Barcelona Traction, Light & Power Co. (Belg. V. Spain)*, 1964 I.C.J. 6 (July 24); *North Sea Continental Shelf (F.R.G. v. Den.,*

analogy, applicable in the particular circumstances of the case at hand. The Trial Chamber of this Court is governed by its Statute and Rules of Procedure and Evidence, which specifically enumerates a right of interlocutory appeal, albeit in limited circumstances, where the criteria listed in Rule 73(B) are met. No decision has been previously made by this Chamber with respect to leave to appeal the Impugned Decision and therefore the Majority was precluded from applying the doctrine of estoppel. A misapplied doctrine of estoppel can not be used to circumvent this right.

23. In my humble opinion it would be a fundamental miscarriage of justice, if a party were precluded from lodging an interlocutory appeal based upon what I consider to be a misplaced doctrine of estoppel. Rule 73(B) clearly provides for a right of interlocutory appeal, in the particular circumstances outlined, and the jurisprudence of the International Tribunals reveals that the Tribunals have distinctly interpreted the right of appeal from a discretionary decision by a Trial Chamber.

24. It is important to note and fundamental to appreciate that when an appeal is sought from a discretionary decision of a Trial Chamber, that may include a question of *whether to grant an amendment to an indictment*; determining which sentence to impose; or considering whether provisional release should be granted; the issue in the appeal is not whether the decision was correct, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.[20] As stated by the Appeals Chamber of the ICTY in the *Milosevic* case, "[i]t is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber".[21] The party challenging the exercise of discretion should demonstrate a discernible error made by the Trial Chamber. The Appeals Chamber in the *Milosevic* case stated that:

> It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.[22]

F.R.G. *v. Neth.), 1969 I.C.J. 3 (Feb. 20); Tinoco (U.K. v. Costa Rica),* 18 Am. J. Int'l L. .Brown, "A Comparative and Critical Assessment", p. 387-90.

[20] *Prosecutor v. Milosevic,* Reasons for Decision on Prosecution Interlocutory Appeal From refusal to Order Joinder, 18 April 2002, para. 4.

[21] *Id.*

[22] *Id,* para. 5.

25. Furthermore, through applying the doctrine of estoppel in its Decision, it is my view that the Majority have considered the merits of the Decision for which leave to appeal is sought, rather than determining whether leave should be granted or not, and consequently in my opinion exceeded their jurisdiction. The legal test to be applied in determining whether to grant leave to appeal in this case is strictly outlined in Rule 73(B).

26. In addition, the criteria of Rule 73(B) is further misapplied by the Majority, where it considers in paragraph 35 of that:

> "[F]or the Prosecution to be successful in establishing the conjunctive elements of exceptional circumstances and irreparable prejudice, it must, in our opinion, demonstrate that its conduct did not contribute to occasioning or causing the irreparable prejudice, if any, which forms the basis of the instant application for leave to appeal".

Upon a strict reading of this Rule, it is my opinion that there is no requirement that the Prosecution rebut a presumption of irreparable prejudice on their part. A prior holding by a Trial Chamber concerning a party's conduct can not be used to prevent that party from establishing grounds for leave to appeal. In addition, both a literal and purposive reading of this Rule is that the party seeking leave to appeal should show that exceptional circumstances exist for the granting of an interlocutory appeal, and to avoid irreparable prejudice to a party.

27. I further disagree with the Majority Decision where it states:

> On what grounds or principle, should the prosecutorial duty to prosecute to "the full extent of the law" be limited in application to the range of alleged criminality involved but not the range of the alleged perpetrators?[23]

In my opinion, the prosecutorial duty to prosecute to "the full extent of the law" must be assessed within the particular context of this Court, that functions pursuant to its own Statute and Rules. In keeping with this mandate, the Trial Chamber, in this Trial, is conducting a trial for three indictees who allegedly bear the greatest responsibility for serious violations of international humanitarian law. This Trial Chamber has a duty to ensure that this trial is conducted both fairly and expeditiously and in accord with the fundamental principles of justice. The duty of the Prosecution to prosecute to "the full extent of the law", within the confines of this trial, includes the duty to ensure that the Accused persons are charged with the offences that they allegedly committed, as specifically enumerated in the Statute. I would not reduce the importance of the Prosecution argument by extending it outside the mandate of this Court to the "range of alleged perpetrators".

[23] Majority Decision, para. 30.

28. Contrary to what was held by the Majority, I consider that the Prosecution have met the two pronged test laid out in Rule 73(B) and I would grant leave for this interlocutory appeal.

Done at Freetown this 5th day of August 2004

Judge Pierre Boutet

[Seal of the Special Court for Sierra Leone]

38. In these circumstances, therefore, the Prosecution is now estopped from raising the issue of irreparable prejudice as this was occasioned the lack of diligence and promptitude on its part in carrying out investigations for the gender crimes, which it rather belatedly wanted to incorporate into the consolidated indictment, coupled with the lack of respect for the principle of timeliness in seeking the amendment for a trial whose commencement was very imminent and which actually started on the 3 June 2004, after we rendered our decision which the Prosecution is contesting, on the 29 May 2004.

RULING

39. In the light of the foregoing analysis and considerations, the Trial Chamber hereby dismisses the Application for want of merit.

Done at Freetown this 2nd day of August, 2004

Hon. Judge Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber

Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]

Hon. Judge Pierre Boutet is appending a dissenting opinion to this Decision.