SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

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

Registrar: Robin Vincent

Date: 24th of May, 2005.

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-PT)

REASONED MAJORITY DECISION ON PROSECUTION MOTION FOR A RULING ON THE ADMISSIBLITY OF EVIDENCE

Office of the Prosecutor:

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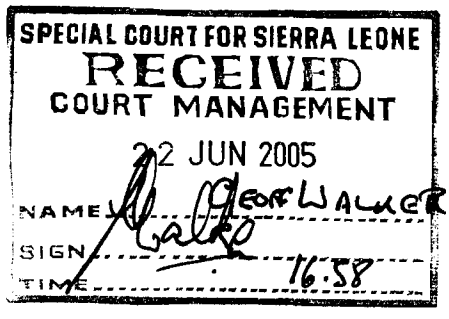

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Court Appointed Counsel for Allieu Kondewa:
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Ansu Lansana

IN TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of the *Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence* filed by the Prosecution on the 15th of February, 2005;

NOTING the *Response of First Accused to Prosecution's "Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence" and Objection to Other Crimes Evidence,* filed by Court Appointed Counsel for the First Accused on the 18th of February, 2005;

NOTING the *Prosecution Reply to 'Response of First Accused to Prosecution's "Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence" and Objection to Other Crimes Evidence'*, filed on the 23rd of February 2005;

NOTING the *Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence,* filed on the 25th of February, 2005;

NOTING the *Response of Third Accused to Prosecution's Urgent Motion for a Ruling on the Admissibility of Evidence,* filed on the 28th of February, 2005;

NOTING *Prosecution Reply to "Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence"*, filed on the 2nd of March, 2005;

NOTING the *Prosecution Reply to "Response of Third Accused to Prosecution's Urgent Motion for a Ruling on the Admissibility of Evidence"*, filed on the 4th of March, 2005;

RECALLING the Decision of this Chamber delivered on the 23rd of May 2005;

PURSUANT TO Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

HEREBY ISSUES THIS REASONED WRITTEN DECISION:

I. SUBMISSIONS OF THE PARTIES

Prosecution Motion and Supporting Submissions

1. As regards this Motion, in respect of which a Decision was rendered on 23rd May 2005, the Prosecution sought a ruling as to the effect of the Trial Chamber's *Decision of Prosecution Request for Leave to Amend the Indictment*, issued on the 20th of May, 2004, concerning a request by the Prosecution to add four new counts containing allegations of sexual offences to the Indictment against the three Accused. Specifically, the Prosecution requested clarification from the Chamber "as to the extent to which the Decision limits the adduction of particular relevant and admissible evidence, under existing counts of the Consolidated Indictment". The Prosecution averred that such a ruling was required because the Trial Chamber had "suggested that the subject evidence may not be admissible as a consequence of the Decision and a ruling would avoid unnecessary arguments prior to the testimony of a number of witnesses".

2. The Chamber notes, at the outset, that the supporting arguments and opposing submissions by the parties in respect of the Motion are intensely prolix in character due to the diversity of perspectives from which the issue was being viewed. However, the Chamber will endeavour to reproduce the contentions in their correct legal perspective in summary form as follows:

3. To begin with the Prosecution's submissions, they may be summarised as follows:

(i) that the particular evidence can be categorised as falling under inhumane acts as a crime against humanity, punishable under Article 2(i) of the Statute, and/or violence to life, health and physical or mental well-being of persons, in particular cruel treatment, as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute;

(ii) that the crime of cruel treatment under Article 3(a) of the Statute is defined in the jurisprudence of the International Tribunals as "an intentional act or omission which causes serious physical and mental suffering or injury or

constitutes a serious attack on human dignity" and that the case law from the International Tribunals has found sexual offences to fall into this category of crimes;[1]

(iii) that "where acts of sexual violence have been perpetrated against a civilian as part of a widespread and systematic attack on the civilian population, the ICTR Trial Chamber has routinely found that such acts properly fall within the ambit of crimes against humanity (other inhumane acts)" (sic);[2]

(iv) that the particulars contained in the Indictment are of an inclusive nature and do not exclude the broad range of unlawful acts which can lead to serious physical and mental harm and that the administration of justice would be brought into disrepute if evidence relating to unlawful acts which potentially fall under more than one category of offences was not adduced based on a "definitional distinction";

(v) that this Motion is in the interests of judicial economy and in the interests of a fair trial, and that the adduction of the subject evidence will not cause any delay in the trial as the material has already been disclosed "in some form" for over 12 months;

(vi) that the evidence has at all times remained relevant and admissible as relating to the infliction of serious physical harm and serious mental harm, and that the proper test is whether the evidence is relevant and admissible on the existing counts, in particular Counts 3 and 4;

(vii) that the admission of this evidence would cause no unfairness to the Accused.

Response of First Accused

4. Objecting to the admission of the subject evidence, Counsel for the First Accused advanced these arguments:

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[1] *Krstic* Trial Judgment, 2 August 2001, para. 513; *Akayesu* Trial Judgment, 2 September 1998; para. 688; *Delalic* Trial Judgment, 16 November 1998, para. 1066.

[2] *Kayishema and Ruzindana* Trial Judgment, 21 May 1999, para. 936; *Niyetegeka* Trial Judgment, paras 463-467; *Akayesu* Trial Judgment, 16 May 2003, paras 688-69; *Kajelijeli* Trial Judgment, 1 December 2003, para. 936.

(i) that the evidence is outside the Indictment and too vague to be included within the scope of the Indictment, and that the offences set forth in Counts 3 and 4 of the Indictment are being used by the Prosecution as "catch all" language, without having to specify in the Indictment the conduct it is relying upon;

(ii) that the Motion violates the Accused's right to a fair hearing enshrined in Article 17(2) of the Statute;

(iii) that the motion is "an attempt to back door the Trial Chamber's prior ruling that the indictment could not be amended to include sex crimes", and that the purpose of an indictment is to put the Accused person on notice of what they should defend themselves against, as required by Rule 47(C) of the Rules;

(iv) that allowing this evidence as proof of "other inhumane acts" would "be a virtual free amendment of the indictment, amounting to new charges, without any specifics in the indictment whatsoever", thereby violating fundamental fairness to the Accused and denying them a fair trial;

(v) that admitting the evidence and trial on a vague indictment would make it impossible to defend fairly and that the new charges would need to be investigated to prepare a defence on these new allegations;

(vi) that the evidence is more prejudicial than probative or relevant to the existing charges, in that evidence of a sex offence has to be more prejudicial than relevant;

(vii) that in the alternative, the admission of such evidence is objectionable as inadmissible character evidence.

Prosecution's Reply to First Accused

5. Replying to the submissions on behalf of the First Accused, the Prosecution contended as follows:

(i) that the subject evidence is not outside the existing Indictment and relates directly to Counts 3 and 4 of the Indictment and therefore does not require any amendment to the Indictment, and that cumulative charging is a standard

practice at the International Tribunals and that if evidence is relevant to existing counts in the Indictment it is admissible;

(ii) that the evidence is relevant and probative and that the probative value outweighs any potential prejudicial effect, and that the Accused will not be unfairly prejudiced by the adduction of this evidence since they had received "the bulk" of disclosure on the subject evidence a year ago;

(iii) that the Defence claim that "a sex offence simply has to be more prejudical than relevant" is entirely unfounded and demonstrates a misunderstanding of the evidence and the law, there being no authority for this, sex crimes being no different from other crimes.

Response of Second Accused to Prosecution's Motion

6. The Response of the Second Accused to the Prosecution's Motion was as follows:

(i) that the alleged sexual offences were not pleaded with specificity in the Consolidated Indictment and accordingly, such evidence is outside the scope of the existing indictment, having regard to Rule 47(c) of the Rules;

(ii) that the proper test to be applied in this case "is whether the evidence is relevant and admissible on the existing counts"[3] and that the evidence on the alleged sexual offences is irrelevant to the offences charged in the Consolidated Indictment;

(iii) that it is generally accepted that evidence is relevant "if its effect is to make more or less probable the existence of any fact which is in issue";[4]

(iv) that it is a generally accepted principle of law that an Accused is guaranteed the right to be informed promptly of the charges against him in the Indictment as provided for in Article 17(4)(a) of the Statute;

[3] Motion, para. 36.
[4] Richard May and Marieke Wierda, INTERNATIONAL CRIMINAL EVIDENCE at 4.23, Transnational (2000) *Quoting* Richard May, CRIMINAL EVIDENCE at 1-13 (Sweet & Maxwell 1999).

(v) that it is not disputed that "gender crimes" may be pleaded in an Indictment as "inhumane acts" or "cruel treatment" and that the jurisprudence is clear on this point;

(vi) that the dispute is over whether the factual basis for allegations of gender crimes has been specified;

(vii) that were the Chamber to admit the proposed evidence, the proceedings would be unduly delayed "to the detriment of the Second Accused's right to be tried without undue delay", and that the presentation of evidence outside the scope of the Consolidated Indictment was not anticipated by the Defence and that they have been operating "under the reasonable assumption that no evidence of the type proposed in the Motion would be presented, as no allegations of gender offences were pleaded in the Consolidated Indictment";

(viii) that the Defence would need an adjournment to train their investigator in the sensitive matter of sex crimes investigation and to re-conduct investigations on this matter;

(ix) that at this late stage in the proceedings, such an adjournment would amount to undue delay, and that the Prosecution should have sought this clarification immediately following the Indictment Decision of the 20th of May, 2004 and that the Accused would be prejudiced if this Motion were to be granted at this late stage of the proceedings.

Prosecution Reply to Second Accused[5]

7. The Prosecution's Reply to the submissions on behalf of the Second Accused may be summarised thus:

(i) that the subject evidence is relevant and admissible as it falls within the existing counts in the Consolidated Indictment;

[5] The Prosecution inadvertently in its Reply refers in various paragraphs to the First Accused, intended as a reference to the Second Accused.

(ii) that the allegations were not pleaded with specificity in the Indictment, but that this does not take the evidence outside the Indictment;

(iii) that the Accused was informed of the allegations against him by means of the individual statements served on him "over a year ago", and has not suffered any prejudice in his ability to prepare his defence, in that the initial disclosure was in July 2003 and further statements were disclosed in February 2004;

(iv) that it outlined the evidence it intended to call in relation to the sexual allegations against the Second Accused in its Pre-Trial Brief of the 22nd of April 2004.

Response of Third Accused

8. The Response of the Third Accused was as follows:

(i) "the acts described in the Motion" could form the basis for a conviction for inhumane acts and violence to life, pursuant to Counts 3 and 4 of the Consolidated Indictment, but that the Prosecution has failed to set forth these allegations in the Indictment;

(ii) that the Third Accused faces an Indictment which lacks precision with regard to "the time period alleged; the geographical location(s) involved; the number of victims; the identity of victims; and the identity of perpetrators";

(iii) that the discovery materials that contain reference to crimes of sexual violence are not the means through which the Accused is informed of the case against him, as submitted by the Prosecution;

(iv) that the Accused is not prepared to confront and cross-examine evidence of sexual violence and that given that the Indictment contained no reference to crimes of sexual violence, and the fact that the request for amendment on the Indictment to include such crimes was denied, there was no reasonable basis for the Accused to prepare to defend himself on such charges;

(v) that their investigators have no training or experience in handling cases of sexual violence and cannot reasonably be expected to undertake their

investigation "without adequate footing", and to respond adequately to this evidence the Accused would need additional time which would result in an undue delay in the trial;

(vi) that the defence of the Accused would be prejudiced by unduly delaying the proceedings.

Prosecution's Reply to Third Accused

9. The Prosecution's Reply to the submissions of the Third Accused may be summarised as follows:

(i) that the Decision of the Trial Chamber declining leave for the Prosecution to amend the Consolidated Indictment to include crimes of sexual violence did not "have the consequence of eliminating relevant and admissible evidence", and that the proposed evidence is relevant and admissible as it falls within the scope of the existing counts in the Consolidated Indictment;

(ii) that allegations of lack of specificity in the Consolidated Indictment cannot support any claim that relevant and admissible evidence must be excluded, but agrees that the Indictment could have been pleaded with more specificity;

(iii) that the central consideration is whether the Accused's ability to prepare his case has been materially impaired;

(iv) that the Accused has been on notice for a considerable time with respect to the nature of the evidence against him, and that witness statements that described acts of sexual violence were disclosed to the Defence over a year ago and that the initial disclosure took place in July 2003;

(v) that its Supplementary Pre-Trial Brief filed on the 22nd of April, 2004 outlined the evidence it intended to call in relation to the sexual allegations against the Third Accused;

(vi) that the *Prosecution Chart Indicating Documentary and Testimonial Evidence by Paragraph of the Consolidated Indictment Pursuant to the Trial Chamber Order Dated*

1 April 2004 that was filed on the 4th of May, 2004 also linked the proposed evidence with Counts 3 and 4;

(vii) that in the *Prosecution Motion for Modification of Protective Measures for Witnesses* filed on the 4th of May, 2004, it created a distinct category for Sexual Assault Witnesses and Victims who would be called at trial;

(viii) that the adduction of the proposed testimony will not cause undue delay as the Defence has been in possession of the relevant material for over a year and has accordingly had time to conduct investigations, and that even if the Defence were granted more time to prepare their defence there would be no undue delay;

(ix) that any prejudice to the Accused must be considered "in the context of the overall interest of justice".

II. PRIMARY DECISION RECALLED

10. During the trial of this case on the 23rd of May 2005, this Trial Chamber issued the following short written published Decision disposing of the present Motion:

> "1. Having carefully considered the merits of the Urgent Motion filed by the Prosecution on the 15th of February 2005 for a Ruling on the Admissibility of Evidence seeking clarification on (i) the extent to which the Trial Chamber's Decision of the 20th of May, 2004 limits the adduction of particular relevant and admissible evidence, under existing counts in the Indictment, and (ii) the extent to which those portions of certain witnesses' testimonies relating to certain unlawful acts can be adduced under existing Counts, as such Counts 3 and 4;
>
> 2. And having further carefully considered the Response of the Defence to the aforesaid Motion; and the Prosecution's Reply thereto;
>
> 3. The Chamber, by a Majority Decision, denies the Motion."

At the end of the Decision it was stated that:

> "A reasoned written Decision will be published in due course to which shall be appended the Dissenting Opinion by the Hon. Justice Pierre Boutet."

III. SUBSIDIARY RULINGS RECALLED

11. Based on the aforementioned Decision, the Chamber delivered three secondary rulings consistent with the said Primary Decision.

12. The First Ruling was given on the 1st of June, 2005 denying, by a Majority Decision (Hon. Justice Pierre Boutet, Presiding Judge, dissenting) the Prosecution's application to permit prosecution witness, TF2-187, to testify in relation to certain acts of sexual violence. Based on its Majority Decision set out in paragraph 10 herein, the Chamber observed that "it has not been able to find any new and convincing legal logic to change its original position taken on this issue in its ruling dated the 23rd of May 2005 rendering such evidence inadmissible, as being, as it were, forbidden evidentiary territory."

13. The second delivered on the 2nd of June, 2005, by a Majority Decision, (Hon. Justice Pierre Boutet, Presiding Judge, dissenting), was that evidence in relation to certain aspects of the testimony of prosecution witness TF2-135 dealing with sexual violence are inadmissible, consistent with the Chamber's Decision of 23rd of May, 2005.

14. The third given on the 3rd of June, 2005 related to an objection by the Defence to a question by the Prosecution to prosecution witness TF2-189, the answer to which would have elicited evidence about forced marriage. By a majority (Hon. Justice Pierre Boutet, Presiding Judge, dissenting) the Chamber upheld the objection and ruled the question put by the Prosecution to be impermissible.

IV. DELIBERATION REINFORCING PRIMARY DECISION OF 23RD MAY 2005

15. Due to the prolixity of the parties' submissions and arguments, already alluded to the Chamber deems it obligatory to frame what, in its opinion, is the key issue for determination with precision and conciseness, and to state, with like precision and conciseness, what the issues are not in order (i) (to coin a legal metaphor) to separate the legal woods from the legal trees and (ii) to articulate fully its reasons in support of the Decision of the 23rd of May, 2005.

A. Key Issue for Determination

16. In the Chamber's opinion, the key issue for determination is whether or not the Article 17(4)(a),(b),(c) statutory due process rights of the accused persons guaranteed them by this tribunal

will be prejudiced or unfairly or adversely impacted upon by the exercise of a prosecutorial discretion or latitude to adduce evidence of sexual violence under existing counts 3 and 4 of the Consolidated Indictment under the crimogenic category of "other inhumane acts" as provided by Article 2(i) of the Statute of the Court, or as acts indictable under Article 3 Common to the Geneva Conventions and of Additional Protocol II punishable under Article 3(a) of the Court's Statute, without any specific pleading to that effect in the aforesaid Indictment, against the background of a denial by the Chamber of a prior Motion for amendment of the said indictment to include counts of forced marriage on the grounds (as the Prosecution submitted) that the existing jurisprudence of other international criminal tribunals supports the proposition that sexual offences do fall within the broad category of "other inhumane acts" as crimes against humanity.

B. Non-Issues

17. Firstly, the Chamber opines that the issue for determination is certainly not whether, as a matter of international criminal law, acts of sexual violence do fall or do not fall within the proscriptive ambit of "*other inhumane acts*" as crimes against humanity under Article 2(i) of the Statute of the Special Court for Sierra Leone. Secondly, in the Chamber's view, it is, likewise not the issue that the jurisprudence of other international criminal tribunals supports or does not support the proposition of law that acts of sexual violence do fall within the proscriptive ambit of "*other inhumane acts*" as crimes against humanity under the statutes establishing those tribunals. Thirdly, from the Chamber's judicial perspective, the issue is not whether or not the administration of justice would be brought into disrepute if evidence relating to unlawful acts which potentially fall under more than one category of offences was not adduced based on, according to the Prosecution, a "definitional distinction." These are not, at this crucial phase of the trial proceedings, the critical issues, we opine, for the purposes of determining the merits of the present application. In a nutshell, they do not really constitute the pith and marrow of the substance of the Motion which, as already noted, strikes at the very root of the procedural due process rights of the accused persons.

C. Basic Applicable Principle

18. Keeping the key issue for determination as formulated in paragraph 16 in proper judicial focus, the Chamber now proceeds to articulate its reasons by way of significant findings for denying the Prosecution's Motion, and for specifically holding that it is impermissible for the

evidence in question to be adduced at this stage. It is trite law that an indictment as the fundamental accusatory instrument which sets in motion the criminal adjudicatory process, must be framed in such a manner as not to offend the rule against multiplicity, duplicity, uncertainty or vagueness, and that where specific factual allegations are intended to be relied upon or proven in support of specific counts in the indictment they ought to be pleaded with reasonable particularity.[6]

V. SIGNIFICANT FINDINGS

19. Applying this principle to the instant Motion, the Chamber finds significantly as follows:

(i) that nowhere in Counts 3 and 4 of the Consolidated Indictment as amended are there any specific factual allegations of sexual violence under the respective statements of the offences of "Inhumane Acts" as a crime against humanity, punishable under Article 2(i) of the Court's Statute, in respect of which the proposed evidence may be perceived as building blocks;

(ii) that based upon the recognised logical nexus that must exist between factual allegations and evidence designed to prove the former as alluded to in (i) above, it cannot be validly posited that the proposed evidence can properly be adduced to support Counts 3 and 4 of the Consolidated Indictment without the underlying factual allegations having been specifically pleaded;

(iii) (a) that the particulars embodied in the Consolidated Indictment in respect of Counts 3 and 4 cannot be validly interpreted to be of an inclusive nature and as not excluding the broad range of unlawful acts which can lead to serious physical and mental harm, especially having proper regard to the formula, "*and any other form of sexual violence*" in Article 2(g) creating a separate specific residual category of sexual violence, of the same kind as rape, sexual slavery, enforced prostitution, and forced pregnancy;

(b) that in the light of the separate and distinct residual category of sexual offences under Article 2(g), it is impermissible to allege acts of sexual violence (other than rape,

[6] In the Sierra Leone jurisdiction, the Court of Appeal deplored the idea of an indictment framed in such a way as to create duplicity, multiplicity or uncertainty in a count or counts both as to the offences or supporting factual allegations – See *Lansana and Eleven Others v. Reginam*, ALR. SL. 186 (1970-71) discussed in *The Criminal Law of Sierra Leone* by Bankole Thompson, published by the University Press of America Inc., Maryland, 1999 at pages 177-207.

sexual slavery, enforced prostitution, forced pregnancy) under Article 2(i) since "*other inhumane acts*", even if residual, must logically be restrictively interpreted as covering only acts of a non-sexual nature amounting to an affront to human dignity;

(c) that the clear legislative intent behind the statutory formula "*any other form of sexual violence*" in Article 2(g) is the creation of a category of offences of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged under "*other inhumane acts*" offends the rule against multiplicity and uncertainty;

(iv) that it would gravely undermine the procedural due process rights of accused persons and thereby bring the administration of justice into disrepute if, at every stage during the conduct of their trial, they are confronted with new pieces of evidence designed to prove factual allegations not specifically pleaded in the Indictment, under the guise of a prosecutorial latitude to broaden the definitional scope of the statutory categories of offences chargeable, the effect of which is to bring about an alignment between such expanded category of criminality and evidence in respect of which no factual allegations have been specifically pleaded, on the grounds of a prosecutorial imperative to prosecute the entire range or spectrum of alleged culpable criminal acts;

(v) that nothing in the records seems to support the Prosecution's assertion that the evidentiary material under reference had been disclosed to the Defence "in some form" over 12 months ago and even if there were, there is nothing in the Consolidated Indictment, the principal accusatory instrument, to sustain such an assertion;

(vi) that the Chamber finds plausible the Defence submission that the Motion is "an attempt to back door the Trial Chamber prior ruling that the indictment could not be amended to include sex crimes";

(vii) that it is a legal misconception that once a determination is made that evidence sought to be adduced is relevant and of probative value, such a finding automatically triggers off its reception in evidence, even though the Indictment may not contain any specific factual allegations underlying that evidence;

(viii) that admitting the disputed evidence, at this very late and crucial stage of the trial, when the Prosecution is about to close its case is not only not fair to the Accused

persons but does derogate significantly from their Article 17 due process rights especially, the Article 17(4) (a) which guarantees every Accused person the right 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.

VI. CONCLUSION

20. Based on the foregoing considerations and the significant findings, the Chamber denies the Prosecution's Motion consistent with its Decision of the 23rd of May 2005.

Hon. Justice Bejamin Mutanga Itoe appends a Separate Concurring Opinion to this Majority Decision; and Hon. Justice Pierre Boutet appends a Dissenting Opinion to the aforesaid Majority Decision.

Done in Freetown, Sierra Leone, this 24th day of May, 2005

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	24th May, 2005

PROSECUTOR	**Against**	SAM HINGA NORMAN MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)

SEPARATE CONCURRING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE, ON THE CHAMBER MAJORITY DECISION ON PROSECUTION MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE

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Dr. Bu-Buakei Jabbi
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IN TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Pierre Boutet;

SEIZED of *Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence* filed by the Prosecution on the 15th of February, 2005;

MINDFUL of the *Response of First Accused to Prosecution's "Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence" and Objection to Other Crimes Evidence,* filed by Court Appointed Counsel for the First Accused on the 18th of February, 2005;

MINDFUL of the *Prosecution Reply to 'Response of First Accused to Prosecution's "Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence" and Objection to Other Crimes Evidence'*, filed on the 23rd of February 2005;

MINDFUL of the *Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence,* filed on the 25th of February, 2005;

MINDFUL of the *Response of Third Accused to Prosecution's Urgent Motion for a Ruling on the Admissibility of Evidence,* filed on the 28th of February, 2005;

CONSIDERING the *Prosecution Reply to "Response of the Second Accused to Urgent Prosecution Motion for Ruling on the Admissibility of Evidence"*, filed on the 2nd of March, 2005;

CONSIDERING the *Prosecution Reply to "Response of Third Accused to Prosecution's Urgent Motion for a Ruling on the Admissibility of Evidence"*, filed on the 4th of March, 2005;

MINDFUL of the Prosecution Motion filed on the 9th of February, 2005 for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa;

MINDFUL of the Chamber Decision dated the 20th of May, 2004, on the Prosecution Motion for Leave to amend the Indictment against Hinga Norman, Moinina Fofana and Allieu Kondewa;

CONSIDERING the submissions of the Parties;

PURSUANT TO Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

MINDFUL of Our Oral Majority Decision on this matter delivered on the 23rd of May, 2005;

I, HON. JUSTICE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE, NOW ISSUE THE FOLLOWING SEPARATE BUT CONCURRING OPINION ON THE CHAMBER MAJORITY DECISION:

HISTORICAL BACKGROUND

INITIAL INDIVIDUAL INDICTMENTS

1. The 3 Accused Persons, Chief Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 1st, 2nd and 3rd Accused respectively, Respondents in this Motion, were each indicted on Individual Indictments, each containing 8 counts alleging crimes against humanity and several other offences.

2. The 1st Accused at his Initial Appearance on the 17th of March, 2003, and the 2nd and 3rd Accused at their individual Initial Appearances on the 30th of June, 2003, pleaded 'Not Guilty' to all the Counts in their respective Indictments.

3. For purposes of a determination of the instant Motion, it is necessary to state that in none of these Initial Individual Indictments did the Prosecution allege the commission by any of the Accused Persons, of any sexual offence in any of the 8 counts.

4. Having realised that they needed to include specific gender offences in the Indictment, the Prosecution, by a Motion filed on the 9th of February, 2004, when we were preparing for the opening of the trial in this case, filed a Motion seeking an amendment to the New Consolidated Indictment in order to add 4 New counts alleging sexual offences against the 3 Accused Persons.

5. I would like to recall at this stage that the Chamber, after the initial appearances of the Accused Persons, and on the application of the Prosecution, granted leave for a single Consolidated Indictment to be filed against these 3 Accused Persons.

6. The Prosecution, without the leave or knowledge of the Court, had taken advantage of the leave that was granted to file the New Consolidated Indictment, to introduce to this Indictment, changes which the Majority Decision of the Chamber, the Separate Concurring, and the Dissenting Opinion later discovered and unanimously characterized as being material and substantial, in fact, changes which the Appeals Chamber in its Decision dated the 16th of May, 2005, described in the same vein, as being new allegations that amount to serious charges of criminality, in places and at times that are not indicated in the original paragraph 18.

7. However, the Prosecution, even at that time failed to introduce an application to the include the 4 New Counts on gender offences in the process of making the application to file the Consolidated Indictment.

8. To sustain the granting of this Application to Amend, the Prosecution canvassed the following arguments:

i. That evidence on gender offences had "just recently" come to its knowledge and possession.

ii. In another reason which is quite unrelated to the first, the Prosecution justified its lateness in seeking this amendment by alleging that it was waiting for the Joinder Motion to be disposed of before bringing the application to amend with a view to including the gender offences.

iii. That granting the Application will not violate the rights of the Accused.

FACTORS WE CONSIDERED IN THE DETERMINATION OF THE MOTION FOR LEAVE TO AMEND

9. In the determination of that Motion to Amend, the Chamber took the following into consideration:

i. That in administering justice in this Court or participating in the process as the Prosecution and the Defence are, it must always be borne in mind that it has a time limited mandate;

ii. That this investigation has lasted for 2 years before the Motion to amend was filed on the 9th of February, 2004;

iii. That the Prosecution admitted being in possession of evidence on gender related offences against the Accused persons since June, 2003, but had failed to include any of them in the New Consolidated Indictment on which the trial is now proceeding.

iv. That the filing of a New Consolidated Indictment was one ultimate available opportunity for the Prosecution to introduce gender offences just as it had, without

the leave of the Court, introduced and made substantial amendments and additions to the Consolidated Indictment.

v. That if the amendment were granted, this trial would have been delayed for quite some time because the Defence would have been entitled to enough time to carry out its investigations into the newly alleged offences in the amended Consolidated Indictment, a process which would not only be contrary to the principles underlying the limited time frame of the Special Court, but also contrary to the statutory rights of the Accused to a fair and expeditious trial.

10. The Defence in this case submitted 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, and that granting an amendment at this stage would amount to an abuse of process.

11. In dismissing the Motion to Amend for lack of the required merits, We had this to say in Our Majority Decision dated the 16th of May, 2004:

> "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 and so would an order emanating from us granting this motion to amend their Indictment."

12. Following our Majority Decision, the Prosecution by a Motion, sought leave to appeal against it. The Chamber, by a Majority Decision, turned it down because no exceptional circumstance or evidence of any irreparable prejudice to the Prosecution's case was demonstrated.

13. Curiously enough, the Prosecution appealed directly to the Appeals Chamber against our Decision denying it leave to appeal under the provisions of Rule 73(B) of the Rules. The Appeals Chamber dismissed the appeal for want of jurisdiction, the leave to appeal having, in accordance with the provisions of Rule 73(B) of the Rules, been denied by the Trial Chamber.

PROSECUTION MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE OF GENDER OFFENCES

14. On the 15th of February, 2005, the Prosecution, about 9 months after we had dismissed the Application to Amend, filed before this Chamber, this Motion which is the subject matter of the present deliberation, for it to be allowed to adduce gender evidence even though the Motion to include 4 New gender offences in the Indictment had been denied by this same Chamber.

SUBMISSIONS BY THE PROSECUTION

15. The Prosecution in this Motion, seeks a ruling, indeed, a clarification as to the effects of the Majority Chamber Decision on the Prosecution Request for Leave to Amend to Indictment.

16. In particular, the Prosecution seeks clarification on the extent to which the Decision limits the addition of particular relevant and admissible evidence under existing counts of the Consolidated Indictment.

17. The need for this ruling, according to the Prosecution's observation, "arise as the Trial Chamber has suggested the subject evidence may not be admissible as a consequence of the Decision and a ruling would avoid unnecessary arguments prior to the testimony of witnesses".

18. The Prosecution explains that it "proposes to lead oral testimony from a number of witnesses whose evidence, or a portion of their evidence, although it would have come within the ambit of the specific proposed amendments is nevertheless admissible concomitantly, under the existing counts" which I note, include Counts 3 and 4 of the Indictment.

19. This evidence which I have noted was included in a confidential annex to this Motion, contains a precis of some of the testimony of the female victims of the alleged gender offences. They were supposed to appear to testify on criminal acts of rape, forced marriages, lootings and killings. It is important to note that Our oral Majority Decision dismissing the Motion seeking to adduce evidence of gender offences to prove Count 3 and 4, was limited only to the issue of adducing gender evidence.

20. The Prosecution further explains that the particular evidence, although often described as 'gender crimes', can be ascribed to either count 3 in addition to or in the alternative to, count 4,

which charges the Accused with Inhumane Acts, A Crime Against Humanity or in the alternative 'Violence to Life, Health and Physical or Mental well being of persons, in particular, cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol 11, punishable under Article 3. a of the Statute.

RESPONSE BY THE DEFENCE

21. The 3 Accused Persons have made individual replies to the submissions of the Prosecution. In their responses, they object to the admission of evidence on gender crimes claiming that it is outside the scope of the Indictment because the evidence on the alleged sexual offences is irrelevant to the offences charged.

REQUIREMENT OF SPECIFICITY IN PLEADING THE ALLEGED GENDER OFFENCES IN THE INDICTMENT

22. To sustain their argument that such evidence is outside the scope of the Indictment, the Defence has argued that the alleged Sexual Offences are not pleaded with specificity in the said Indictment as required by the provisions of Rule 47(C) of the Rules which stipulate as follows:

"The Indictment shall contain, and be sufficient if it contains ... a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence."

RIGHT OF THE ACCUSED TO BE INFORMED OF THE OFFENCES ALLEGED

23. Counsel for the Accused also argue that if such evidence is allowed to be adduced at this stage, it would violate the statutory right guaranteed to them under the provisions of Article 17(4)(a) of the Statute "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". They further argue that if the Chamber admits the proposed evidence, the proceedings will be unduly delayed to the detriment of the statutory rights of the Accused to be tried without undue delay.

24. The Prosecution concedes to the submissions by the Defence that the allegations were not pleaded with specificity in the Indictment but argues 'that this does not take the evidence outside the Indictment'.

DELIBERATION

25. I am of the opinion that the Indictment is the foundation on which every prosecution stands, in fact, the agenda on which criminal proceedings are based. It is the instrument by which the Prosecution informs the Accused promptly and in detail, in a language which he or she understands, of the nature and cause of the charge against him or her, and in so doing, limits the number and the nature of the offences on which it has decided to base its prosecution against the Accused.

26. In a bid to circumvent its obligations to promptly inform the Accused of the offences he is alleged to have committed, the Prosecution argues that evidence of gender offences was disclosed to the Defence of the 2nd Accused in the form of Witness Statements and a Trial Brief filed over a year ago and that he has not suffered any prejudice in his ability to prepare his defence.

27. I would, on this issue, like to state that the only way the Prosecution can be seen to have fully complied with its obligation under Article 17(4)(a) of the Statute to promptly inform the Accused Person of the offences for which he is charged is through an Indictment that has been preferred against him. It is my considered opinion that this conclusion holds good for the following reasons which to me are convincing, in the light of the accepted principles of law and Practice in the domain of Criminal Law and Procedure:

i. The evidence assembled during investigations is so massive that it requires some pruning by the Prosecutor for him to make up his mind as to which of the several offences revealed in the witness statements and the exhibits he will prefer against the Accused.

ii. Even though Trial Briefs contain a summary of elements of the crimes alleged, they are not, and cannot be characterized as Indictments within the meaning of Rule 47 of Rules for purposes of ensuring the respect of the rights of the Accused under Article 17(4)(a) of the Statute.

iii. It is common knowledge in criminal law and practice, be it at national level or at the international level, that statements, documents and exhibits assembled during investigations could and do, in a good number of cases, disclose many more

> offences than those the Prosecutor includes in his Indictment. This of course comes within the exercise of his prosecutorial discretion as envisaged in Article 15 of the Statute, that is, to indict all or only some of the suspects for either all or only for some of the offences disclosed by the evidence assembled during the investigations.

28. In this regard and in respect of these proceedings, We, both in Our Majority Decision of the 20th of May, 2004 (Page 12 Para 34) dismissing the Application to Amend the Indictment in order to add 4 Counts on gender offences, and in Page 10 Para 30 of Our Decision of the 2nd of August, 2004, denying the Prosecution Leave to File an Interlocutory Appeal against Our Decision of the 20th of May, 2004, did hold that the Prosecution was under no obligation either to prosecute all offences both under International and Sierra Leonean Law as stipulated by the Agreement and the Statute, or all offenders disclosed by the evidence assembled during investigations in any given case, nor has it in fact done so in the proceedings relating to the CDF and the RUF group of Indictees that are on-going before us.

29. Confirming Our stand on this Prosecutor's discretion and policy, the Appeals Chamber of the Special Court, in its Decision dated the 16th of May, 2005, also had this to say in Page 30 Para 82:

> "The Prosecutor has not duty to indict a defendant for every offence in respect of which there exists prima facie evidence against him."

30. What the Prosecution is seeking in this Motion is to be allowed by the Chamber to adduce evidence of gender crimes in order to prove counts 3 and 4 of the Consolidated Indictment, even though no Count alleging gender offences appears in the said Indictment. The Prosecution argues that this is possible because sexual crimes and the evidence related thereto involve violence to life, health and physical or mental suffering or well being of persons just as they constitute a crime against humanity which is punishable under Article 2-1 of the Statute.

CONTENTS OF THE INDICTMENT

31. I will, for purposes of an analysis of the arguments advanced by the Parties, reproduce in its entirety, the contents of Counts 3 and 4 of the said Indictment which read as follows;

"COUNTS 3-4: PHYSICAL VIOLENCE AND MENTAL SUFFERING

26. Acts of physical violence and infliction of mental harm or suffering included the following:

a. between about 1 November 1997 and 30 April 1998, at various locations, including Tongo Field, Kenema Town, Blama, Kamboma and the surrounding areas, the CDF, largely Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilian;

b. between November 1997 and December 1999, in towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas, and the Districts of Moyamba and Bonthe, the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilian by the actions of the CDF, largely Kamajors, including screening of **"Collaborators,"** unlawfully killing suspected **"Collaborators,"** often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of **"Collaborators"** , the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA AND ALLIEU KONDEWA,** pursuant to Article 6.1. and, or alternatively, Article 6.3 of the Statute, are individually criminally responsible for the crimes alleged below:

Count 3: Immune Acts, a **CRIME AGAINST HUMANITY,** punishable under Article 2.i. of the Statute;

In addition, or in the alternative:

Count 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA**

CONVENTIONS AND ADDITIONAL PROTOCOL II, punishable under Article 3.a. of Statute."

32. From the content of counts 3 and 4 on which the Prosecution is relying to adduce the contested evidence, we note an enumeration of specific acts which the Prosecution opted to retain and use with a view to alleging that the said acts are constitutive of the elements of offences of physical violence and infliction of mental harm or suffering committed by the Kamajors. These include specific acts such as inflicting serious bodily harm, serious physical suffering, screening and killing of suspected collaborators, illegal arrest and unlawful imprisonment of collaborators, destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or both.

RELATIONSHIP BETWEEN THIS APPLICATION AND THE CHAMBER DECISION DENYING THE PROSECUTION'S MOTION FOR AMENDMENT OF THE INDICTMENT

33. The Accused's right and entitlement to a fair trial does and should in fact include the right to seek the exclusion of all evidence which, even if it were considered relevant is, depending on the circumstances of the particular case such as this, prejudicial to the Accused either because it suggest the possibility that he committed other crimes which do not feature in the Indictment, or that such evidence is not directly related or relevant to the fact in issue, notably, to the crimes charged in the said Indictment.

34. Indeed, one of the fundamental principles on which International Criminal Justice is based is that an Accused Person should neither be tried nor convicted on the strength of evidence relating to an offence for which he has not been indicted, nor should such evidence be adduced or admitted if this would not only be contrary to the provisions of Article 17(4)(a) of the Statute, but will also amount to a flagrant violation of the principle of fundamental fairness.

ABSENCE OF ANY SPECIFIC ALLEGATIONS OF ANY GENDER OFFENCE

35. What appears apparent in the content of counts 3 and 4 of the Indictment and what I note is the absence of any specific mention of any gender offences in the Prosecutor's enumeration in the statement and the particulars of the offences alleged in Counts 3 and 4, as constituting the offences of inhumane acts or as a crime against humanity and furthermore, as amounting to

violence to life, health and physical or mental well being of persons, in particular cruel treatment, which is a violation of Common Article 3 of the Geneva Conventions.

36. I would like to say here that a failure to plead in the Indictment, material facts and elements of offences which the Prosecution intends to rely on to prove it, renders it vague, unspecific, and defective. It is in fact surprising to note that the Prosecution, in amending without the leave of the Chamber, the Initial Individual Indictments and replacing them with a New Consolidated Indictment which, in these proceedings, has sparked off an intense judicial controversy, did not take advantage of that very opportune moment to seek the leave of the Court, to introduce gender crimes.

37. This strategic move was necessary in order to clearly put the Accused Persons on notice that they were to face charges on gender offences for which leave to amend had been refused and in respect of which the Prosecution is now, without any specific counts on them, seeking leave to adduce evidence related to the said gender offences so as to prove counts 3 and 4 of the Indictment. In failing to do this, the Prosecution does not appear to have appreciated the full context of the decision of The Chamber which had, for reasons related to the lack of promptitude and diligence on its part, denied it leave to amend the Consolidated Indictment so as to include those 4 new Counts relating to sexual offences.

38. In this regard, I have already said that the Prosecution is not obliged to prosecute all offences or all offenders revealed by the evidence but should, within reasonable time frames, granted that we are operating within the context of a Court with a time limited mandate, prefer an Indictment which clearly spells out those offences it has selected to prosecute. The Prosecution had already done this.

39. The presumption thenceforth therefore, is that unless leave to amend to add a new charge or charges were granted by the Chamber, the omission to charge for an offence which is, or may be borne out by the evidence, means, for the Accused, as far as it concerns prompt notice to him or her of the nature and cause of the charge against him or her, that the charge or charges have been dropped and that there is no need for their Counsel to conduct defence investigations for purposes of an effective cross-examination on the testimony relating to those offences that do not feature clearly in the Indictment.

40. In the case of PROSECUTOR VS KUPRESKIC ET AL, the Trial Chamber, commenting on the term "other inhumane acts", reasoned that it lacks precision and is too general to provide a safe yardstick for the work of the Tribunal. In fact, the term "Inhumane Acts" was held to be so wide that it would violate the principle of specificity required in criminal law.

41. In the case of SIMIC, the Accused was charged with the crime of cruel and inhumane treatment as acts of persecution. ***The Chamber declined to consider any cruel and Inhumane Acts falling outside the beatings, forced labour assignments and confinement under inhumane conditions which were specifically pleaded in the Indictment.*** The Chamber considered the wording cruel and inhumane treatment too vague and unspecific to have provided notice to the Defence of the incidents not explicitly set out in the Amended Indictment.

42. The case in hand is indeed on all furs with the SIMIC Decision in relation to the necessity to enumerate the acts or offences that constitute the offence of Cruel and Inhumane Acts that is pleaded in Counts 3 and 4 of the Indictment. In fact, I am of the opinion that the arguments raised on the pleading of offences in an Indictment with specificity as required by Rule 47(C) of the Rules are directly related to and in fact impact on the doctrine of relevance and the admissibility of evidence which, in my considered judgment, should be admitted only if the evidence is related to facts in issue, that is, to the offences charged in the Indictment, rather than throw the gate open for the admission of evidence which may either be irrelevant to the facts in issue or prejudicial to the interests of the Accused.

43. In the KAYISHEMA CASE, the Prosecution failed to adequately particularize the portions of evidence that supported the "Other Inhumane Acts" charges The Chamber was of the opinion that that this method of using the crime as a 'catch-all' specifying which acts support the count almost as a postscript – does not enable the counts of the "Other Inhumane Acts" to transcend from vagueness to reasonable precision.

TRIAL OF THE ACCUSED WITHOUT UNDUE DELAY

44. One of the objections raised by the Defence is that the evidence on gender crimes sought to be adduced at this stage of the proceedings is extraneous to the indictment and would violate the Accused's right of being tried without delay. On this argument, I would to observe that the Prosecution had, during the last session of this trial, indicated that it was to close its case in June,

2005, during the 5th session of this trial. If this Motion seeking the authority to lead evidence on gender crimes in order to prove offences alleged in Counts 3 and 4 were to be granted, we should equally be prepared, in order to ensure that the trial is fair, to grant the Defence, and this, in conformity with the doctrine of equality of arms, a reasonably long adjournment to enable it, in addition to the heavy burden it bears in the preparations for the commencement of the trial that was imminent, to carry out investigations on this proposed evidence so as to be in a position to effectively cross-examine those Prosecution Witnesses on their proposed gender testimony.

45. The peculiarity of this Court which is unique and which I again would like to underscore here is that from the onset, its life span was limited by the Agreement and the Statute that set it up. In our Majority Decision dated the 20th of May, 2004, referred to earlier, dismissing the Motion seeking to Amend the Indictment in this case in order to include gender offences, We, on Page 15 Para 53, had this to say on what may amount to an 'undue delay' in trying the Accused, given the particular context of this Court:

> "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."

46. Given that the closure of the case for the Prosecution is imminent, we have no convincing legal reason to shift grounds from the stand we had earlier taken on this issue because the trial of the Accused will be unduly delayed if we do grant the Prosecution's application.

47. The Dissenting Opinion dated the 31st of May, 2004, on the Application for leave to Amend the Indictment in this case which supports the Amendment, referred, amongst others, to the Canadian Case of PROULX VS THE ATTORNEY GENERAL OF QUEBEC in which the Supreme Court of the Canada stated as follows:

> "The Crown must have sufficient evidence to believe that guilt could properly be proved beyond 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."

48. If this case whose dictum I hold in high esteem, is cited to justify the latitude which the Prosecution enjoys in determining the length of time it needs to assemble evidence before preferring charges or an Indictment, my reaction to this, with due respect, is that it cannot, even in the context of the cited case, be said to be limitless if the universal principle of trying Accused Persons without undue delay has to be seen to be respected.

49. Furthermore, I would say that the Canadian Judiciary is one of those we have referred to in our Decision as a municipal institutional monument that does not wither away with time, but while time is also of the essence in this context in Canada, it may not be as much of the essence there as it is in this case and environment where the Prosecution, operating in a Court with a time limited mandate, should be, and is indeed, permanently and attentively preoccupied with thoroughness and expeditiousness in accomplishing its judicial functions within this strictly defined time frame.

50. In this regard, and in that same Majority Decision refusing the Leave to Amend, We, on the issue of the diligence with which the Prosecution should have acted in relation to the detection of those gender offences, granted that the Prosecutor functions with "Prosecutors and Investigators experienced in gender related crimes" as stipulated in Article 15(4) of the Statute, had this to say.

> " ... This should have been uncovered through the exercise of 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 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 ... ...The second question is whether the rights of the Accused persons would be violated if the amendment sought by the Prosecution were granted ...
>
> 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 ... "

DISTINCTION BETWEEN THIS CASE AND OTHERS THAT HAVE BEEN CITED

51. On another score and more importantly, I consider that the situation in this case, even though similar to others in its rationale, is, at least in one aspect, clearly distinguishable from the

jurisprudence of other Sister Tribunals which have been cited by the Prosecution. The issue of admissibility of gender evidence which we are examining here, in fact dates as far back as the 9th of February 2004, and has a direct connection with the Prosecution's Application to Amend the Indictment in order to add 4 new Counts on gender offences that was filed on that date.

52. Our Decision rejecting the said Application, I have recalled, was rendered on the 20th of May, 2004. It was rejected because we considered that it was not brought in time and that it would, if granted at that stage, violate the rights of the Accused under Articles 17(4)(a) and 17(4)(c) of the Statute. The Prosecution applied for leave to appeal against this Majority Decision under the provisions of Rule 73 of the Rules. This application was turned down for reasons indicated earlier. The Prosecution, still contesting this decision and again as I have already indicated, appealed against it even though the law makes it clear that decisions under Rule73(B) are appealable only when leave is granted by the Trial Chamber. The Appeals Chamber dismissed the appeal.

53. It is again the Prosecution which, after losing its judicial bid to have included in the Indictment, the 4 new gender Counts, that is moving this same Chamber, to grant leave for it to be allowed to adduce gender evidence which the Prosecution admits was to be adduced and used to prove those 4 new Counts but this time, according to the Prosecution, to prove 2 existing Counts in the Indictment, namely Counts 3 and 4, which We observe, make no mention of gender acts alleged as constituting the offences featuring therein.

MOTION FOR THE ADMISSIBILITY OF EVIDENCE

54. As far as this Motion on the Admissibility of Evidence is concerned and in the light of the foregoing analysis, I am of the opinion that just as the Prosecutor is under no duty or obligation to institute a prosecution for all offences or against all offenders identified by the evidence assembled, so also is the Prosecution equally neither under a duty nor an obligation to adduce all evidence available to it after investigations, to prove any case, particularly in the following circumstances:

i. where it is not directly or ex facie, relevant to facts in issue, that is, to the Counts in the Indictment;

ii. where its probative value is outweighed by the prejudicial effects it might have on the legal and statutory rights of the Accused;

iii. where it violates the Accused's Article 17(2) statutory rights to a fair hearing, as well as those of Article 17(4)(a), (b) and (c) which require that he be informed promptly of the charge against him, to have adequate time and facilities for the preparation of his or her Defence, and in addition, to be tried without delay and,

iv. where the evidence is such that it should, even if it were ordinarily relevant, be excluded from the records if admitting it would bring the administration of justice into disrepute within the context of Rule 95 of the Rules, or would be prejudicial to the integrity of the proceedings.

APPLICABLE LAW AND JURISPRUDENCE

55. I would like to say here that besides the fact that the Courts have an inherent jurisdiction to exclude irrelevant evidence, they also have the inherent jurisdiction and are, at the same time, vested with the discretion, under Rule 89(C) of the Rules, 'to admit any relevant evidence'. Furthermore, in the process of admitting or excluding evidence, Rule 54 of the Rules provides as follows:

> "At the request of either Party or of its own Motion, a Judge or a Trial Chamber may issue such orders, or summonses, subpoenas, warrants and transfer orders as may be necessary for purposes of an investigation or for the preparation or conduct of a trial."

56. Under this Rule, the Court or the Judge of its own Motion or at the request of any party, enjoys the extensive discretion to issue such Orders as may be necessary for purposes of an investigation or for the preparation or conduct of a trial and in doing so, should ensure that rights of the parties are adequately protected.

57. These rights include inter alia, for the Prosecution, the right to or not to prosecute any Accused Person, and, subject of course to the general rules on the mechanics of admissibility, to adduce all relevant evidence in the pursuit of that objective. For the Accused on the other hand, this means, inter alia and particularly, the right to a fair trial, to be protected against evidence which is either irrelevant or inadmissible, to be informed promptly of the charges against him, to

have adequate time and facilities for the preparation of his or her Defence, and in addition, to be tried without delay.

APPLICATION OF THE PRINCIPLE OF GENERALLY ACCEPTED RULES OF EVIDENCE

58. The Chamber of a Judge for purposes of a fair determination of any matter, may apply other Rules of evidence that are consonant with our Statute and with the general principles of law. In this regard, Rule 89(B) and 89(C) of the Rules provide as follows:

Rule 89(B):

> "In cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

Rule 89(C):

> "The Chamber may admit any relevant evidence."

59. I would to say here that Rules and general principles referred to in Rule 89(B) and the notion of 'relevance' in Rule 89(C) include the jurisprudence which the Courts and Tribunals have built up over the years and which is currently being developed on similar issues.

60. MAY AND WIERDA INTERNATIONAL CRIMINAL EVIDENCE PAGE 103 PARA 4.25, have this to say on the same issue:

> "... Courts have an inherent jurisdiction to exclude irrelevant evidence. This was reflected in the IMT and IMTFE Charters (Articles 20 and 13) respectively which stated that the Tribunal may require to be informed of the nature of any evidence before it was offered so that it may rule upon it's relevance. The Judges were under no duty to exclude irrelevant evidence in order to preserve the right of the accused to a fair and expeditious trial. Thus the IMT Charter also stated at Article 18:
>
> "The Tribunal shall (a) ***confine the Trial strictly to a hearing of the issues raised by the charges, (b) take strict measures to prevent any action which will cause unreasonable delay,*** and rule out irrelevant issues and statements of kind whatsoever."

61. In the United States America, the Federal Rules of Evidence (Rules 403 and 404) on this same subject provide that:

> "Although relevant, ***evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice***, confusion of issues, or misleading the jury or ***by considerations of undue delay, waste of time***, or needless presentation of cumulative evidence."

62. Even though the provisions of Rule 95 regulate the issue of the admission of prejudicial evidence, albeit indirectly, and although the Court has the inherent jurisdiction to exercise a discretion to exclude prejudicial evidence under the general provisions of Rule 54 of the Rules, I still consider, in the circumstances, that a reference and an application of other Rules of Evidence which will best favour a fair determination of the matter before us and which are consonant with the spirit of the Statute and the general principles of law as provided for in Rule 89(B), including the applicable jurisprudence, will advance a fair determination of the issues at stake in the instant Motion.

63. In applying the provisions of Rule 89(C), subject of course to the provisions of Rule 95 of the Rules, I observe that for such evidence to be admitted, it must, as is usually the case in criminal cases, be relevant to the ingredients of the offences alleged in the Indictment, and furthermore, that it is not prejudicial to the legal and statutory rights of the Accused

WHAT AMOUNTS TO PREJUDICIAL EVIDENCE

64. Prejudicial evidence, in my considered opinion, is evidence which, if adduced, has the potential of staining mind of the Judge with an impression that adversely affects his clean conscience towards all parties, and particularly, towards the party who is the victim of that evidence which is tendered, to the extent that it leaves in the mind of the Judge, an indelible scar of bias which could make him ill disposed to the cause of the victim of the said evidence as a result of which an injustice could be occasioned to that party who after all, may be innocent or have a just cause, and who, but for the admission of that contested evidence, should ordinarily have had the benefit of the judicial balance tilting in his favour.

65. In the light of the above, it is evident that evidence is not necessarily prejudicial because it is incriminating but because it is considered, even if it were relevant at all, as being unfairly

compromising of the interests and the status of innocence or of the good standing of the victim of such evidence.

66. In Black's Law Dictionary 7th Ed., undue prejudice is defined as the 'harm resulting from a fact Trier being exposed to evidence that is persuasive but inadmissible or that so arouses the emotions that calm and logical reasoning is abandoned.

67. Indeed, as stated by Peter Murphy in A Practical Approach to Evidence, 3rd Ed., Page 7:

> "The general rule is that for evidence to be received by the Court, it must be relevant to the facts in issue. The proof of supernumerary or unrelated facts will not assist the Court and may, in certain cases prejudice the Court against a party while having no probative value on issues actually before it."

68. I would like to refer here to the case of R V SANG (HL) [1980] AC 402 AT 434 where LORD DIPLOCK had this to say:

> "... there has now developed a general rule of practice whereby in a trial by jury the Judge has the discretion to exclude evidence which, ***though technically admissible***, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value."

69. In the case of NOOR MOHAMED VS R [1949] AC 182, LORD DU PARCQ had this to say:

> "... cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused ***even though there may be some tenuous ground for holding it technically admissible*** ..."

THE CASE OF THE PROSECUTION VS ISSA HASSAN SESAY, MORRIS KALLON AND AUGUSTINE GBAO CASE NO SCSL-04-15-T

70. In addition to the preceding analysis, and on the legal issue of exclusion of evidence on the grounds of its having a prejudicial effect, Our Trial Chamber came into grips with determining the extent to which Rule 89(C) and Rule 95 of the Rules could be applicable following a Defence Oral Application to exclude a portion of the testimony of a Prosecution witness in the proceedings against RUF group of Indictees, namely, Issa Hassan Sesay, Morris Kallon and Augustine Gbao.

71. In this case, one of the Counts in the Indictment alleges looting against the 3 Accused Persons. On the 28th of April, 2005, during the trial proceedings, a Prosecution Witness testified that when he was on his way to Kailahun, the 3rd Accused, Augustine Gbao, who was then the Chief Intelligence Military Officer and Leader of Military Investigation and Broadcasting (MIB) for the RUF, took his drug from him and said that it had become 'government property' meaning that it no longer belonged to him . Gbao, as was expected, never gave the drug back to the witness. This, for this witness who had been given the said drug to cure his bleeding ear, meant that he was permanently dispossessed of it by the 3rd Accused, Augustine Gbao.

72. At the conclusion of this witness' testimony, Counsel for Mr. Gbao, made an oral application for the exclusion of this evidence under Rule 89(C) of the Rules. He contended that the evidence that Mr. Gbao had stolen the drug from the Witness 'paints a picture' of the 3rd Accused as 'having a spiteful nature'. Gbao's Counsel accordingly submitted that the evidence was prejudicial, of no probative value whatsoever, and not relevant to any Count in the Indictment. The Prosecution in reply submitted that the incident may well be evidence of looting which is an offence charged in the Indictment and that the evidence sought to be excluded is relevant.

73. In dismissing the oral application and admitting the evidence related to the alleged taking of the drug by the 3rd Accused from the Prosecution Witness, we had this to say in our Decision:

> "In conclusion therefore, the Chamber is satisfied that the evidence in question may be relevant to the facts in issue and the relevant Charge in the Indictment. We are likewise, satisfied that the prejudicial effect of the admission of the evidence does not outweigh its probative value."

THE JUDGE'S DILEMMA IN THE PROCESS

74. In administering justice, a Judge is guarded and guided by the law and in the process, is only answerable to the law and to his conscience. As he follows the evidence adduced by the parties on the issues at stake, his conscience and sentiments are supposed to remain sacrosanct , unstained and stable so as to enable him to continue holding the judicial balance with the equilibrium of the law and the Judge's conscience that are supposed to regulate it.

75. Given the traditional role of the Judge to control this balance and to ensure that the parties before him are on an equal pedestal within the context of the principle of equality of arms,

it becomes necessary for him to see to it that only relevant and legally admissible evidence is admitted whilst at the same time ensuring that evidence which is unfair and prejudicial to either party, even if it were ordinarily relevant, is excluded, if it is prejudicial and if admitting it will not only violate the doctrine of fundamental fairness but will also impact negatively on the integrity of the proceedings, and more importantly, bring the administration of justice into disrepute.

STATUS OF THE GENDER EVIDENCE AND ITS ADMISSIBILITY

76. In the light of the foregoing, what status would I accord, in these circumstances, and in the light of the foregoing analysis, to the gender evidence that has been tendered by the Prosecution and objected to by the Defence on the grounds, inter alia, of prejudice?

77. The Prosecution accepts that the evidence they are seeking to introduce is the same evidence they were to adduce to prove the 4 New Counts if they succeeded in adding them to the Indictment. If it knew that the gender offences or evidence related to them are ingredients of or are offences that are classified as Inhumane Acts or Crimes Against Humanity, or that those gender recriminations are encapsulated into these globally defined offences, one would imagine that the Prosecution would not have thought it necessary to apply to the Chamber for an Order to amend in order to include 4 new Counts on gender offences in the Indictment . Furthermore, one would like to understand why the Prosecution, in drawing up the Consolidated Indictment, which should be in conformity with the provisions of Rule 47(C) and for purposes of clarity, did not, in Counts 3 and 4, specifically allege or even mention these sexual offences or acts as constituting Inhumane Acts or Crimes Against Humanity.

SUMMARY AND CONCLUSION

78. In the light of the foregoing analysis of the facts, of the Rules of Procedure and Evidence of the Special Court, and of the Rules which I have, for purposes of this Opinion, referred to in the light of the provisions of Rules 89(B) and 89(C) including the jurisprudence related thereto, it is my opinion, and I do so hold, that the Application by the Prosecution for Leave to Adduce Gender Evidence in these proceedings, given the circumstances of the this time limited Court and of this case, can neither be sustained nor allowed for the following reasons:

i. Failure To Plead Gender Acts Or Offences In Counts 3 And 4 Of The Indictment

A failure by the Prosecution to plead gender acts or offences in Counts 3 and 4 or anywhere else in the said Indictment, given that a mere allegation of Inhumane Acts as offences against humanity is too vague to be as specific as it is supposed to within the context of Rule 47(C) of the Rules, is fatal to the admissibility of this evidence

ii. No Obligation To Charge All Offences And Offenders

The Prosecution is not obliged to prosecute all offences or all offenders as the evidence may disclose nor is it under a duty or obligation to adduce all the evidence at its disposal particularly if it is not directly relevant to the facts in issue, such as the gender crime evidence sought to be adduced by the Prosecution is, in relation to Counts 3 and 4.

The rule of relevancy is intended to limit the admissibility of facts only to those which are directly and not just speculatively relevant or incidental to the issues at stake. They should not be extraneous and must be so directly connected to the facts in issue that it does not require straining the imagination to determine whether that piece of evidence sought to be adduced or admitted, is indeed relevant to the issues at stake or not.

In this regard, the omission to charge for an offence which is borne out by the contested evidence means that the charges have been dropped and that the Court should not allow that evidence to be adduced, furthermore, that the Defence does not need to carry out investigations into the evidence relating to the abandoned charges for purposes of ensuring an effective cross examination on the testimony relating to those offences.

iii. Right To A Fair Trial

The right of the Accused to a fair trial as guaranteed in Article 17(2) requires that the evidence to be adduced in the trial must be directly relevant to the facts in issue, that is, to the counts and offences alleged in the Indictment and not evidence extraneous to them, in other words, irrelevant to proving those charges.

iv. Imminent Closure Of The Case For The Prosecution

The Prosecution has already indicated that it is at the verge of closing its case. If it were, at this stage, allowed to adduce the evidence it is seeking to, this would obligatorily necessitate a reasonably lengthy adjournment for the defence to carry out investigations on the proposed evidence of the witnesses in question so as to effectively conduct their cross examination of those witnesses on their proposed testimony. This process will certainly, in the context of the time limited mandate of this Court, involve an undue delay in the trial of the Accused Persons who, I observe, have been held in custody for quite some time, and will occasion a violation of their rights under Article 17(4)(c) of the Statute.

v. The Doctrine Of Fundamental Fairness

The admission of the gender evidence after the Chamber had denied the Prosecution's Motion to amend the said Indictment in order to include gender offences which were to be established by a recourse to adducing this contested evidence is, to my mind, offensive to the doctrine of Fundamental Fairness and the Respect for Judicial Decisions by all Parties.

In fact, if this application were granted, it will mean that we would have, for no good or just cause, indirectly overturned our own Decision of the 20th of May, 2004, which refused the Prosecution leave to amend and add 4 New Counts alleging gender offences. This course of action, to my mind, is neither judicially desirable nor acceptable.

I think that Their Lordships, The Learned Justices of the Appeals Chamber, if and when they become seized of this issue in due course, will exercise their appellate prerogatives in this regard at the appropriate time.

vi. The Prejudicial Nature Of The Evidence

The argument that the evidence sought to be adduced will be prejudicial to the interests of the accused appears to me to be well founded in the light of the law and the jurisprudence I have highlighted on this subject.

In this regard, I am of the opinion that the evidence which the Prosecution is seeking to adduce under the guise of proving Count 3 and 4 of the Indictment is indeed of a nature to cast a dark cloud of doubt on the image of innocence that the Accused enjoys under the law until the contrary is proved. In addition, it has the potential of violating his statutory right to a fair trial.

vii. Furthermore, Rule 26bis of the Rules provides as follows:

"The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"

If this application of the Prosecution to adduce this evidence were to be allowed, The Chamber, considering a number of the preceding considerations, would not have fully respected the rights of the Accused Persons as required by Rule 26bis and other statutory provisions in this regard particularly so because the prejudicial effect of the admission of the evidence in issue would outweigh its probative value.

CONCLUSION

79. Having regard to the foregoing considerations,

I concur with the Conclusion and the Order as set out in the Majority Decision.

Done in Freetown, Sierra Leone, this 24th day of May, 2005.

Hon. Justice Benjamin Mutanga Itoe,
Presiding Judge

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	24th of May, 2005

PROSECUTOR	Against	SAM HINGA NORMAN MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-PT)

DISSENTING OPINION OF JUSTICE PIERRE BOUTET ON DECISION ON PROSECUTION MOTION FOR A RULING ON THE ADMISSIBLITY OF EVIDENCE

Office of the Prosecutor:

Luc Côté
James Johnson
Kevin Tavener

Court Appointed Counsel for Sam Hinga Norman:
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Michiel Pestman
Arrow Bockarie

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana

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

I. INTRODUCTION

2. This Decision is in response to the Motion of the Prosecution seeking clarification as to the effect of the *Decision of Prosecution Request for Leave to Amend the Indictment* ("Indictment Decision"), issued on the 20th of May, 2004 by the Trial Chamber, and considers whether evidence of sexual violence may be adduced at trial in support of existing Counts in the Consolidated Indictment against the Accused.

3. For the purposes of this Decision, I adopt the introductory portions set forth in the Majority Decision that include an outline of the background to this Motion and the submissions of the parties.

II. DISCUSSION

4. As a preliminary point, I wish to note that motions to clarify are not expressly provided for in the Rules, nor do they form part of the practice of the Special Court. The current Motion does, however, raise an issue of importance as to whether evidence of sexual violence may be adduced at trial in support of existing Counts in the Consolidated Indictment against the Accused, and I consider that it would be in the interests of a fair and expeditious trial to clarify this matter at this stage of the proceedings.

5. The Prosecution submits that this Motion for clarification is filed as a consequence of the Trial Chamber's Majority Decision dismissing the Prosecution's Motion to amend the Consolidated Indictment to include, *inter alia,* four new counts of sexual violence, namely, rape as a crime against humanity; sexual slavery and other forms of sexual violence as a crime against humanity; other inhumane acts as a crime against humanity; and outrages upon personal dignity as a violation of Common Article 3 to the Geneva Conventions and of Additional Protocol II. The Prosecution submits that they are unclear as to the effect of this Decision with respect to evidence it intends to adduce in support of Counts 3 and 4 which would however raise issues of sexual violence.

6. The direct effect of the Indictment Decision is that the Consolidated Indictment is not amended as requested by the Prosecution, and no new counts were added to the existing Indictment.

This Decision has no effect on the existing form of the Consolidated Indictment or upon the adduction of evidence that is relevant and probative to the offences set forth in the Counts of the Indictment. In order, therefore, to assess whether the proposed evidence may be adduced at trial, the existing counts of the Consolidated Indictment must be considered.

7. The Prosecution submit that the proposed evidence is relevant to Counts 3 and 4 of the Indictment, namely, inhumane acts as a crime against humanity, and violence to life, health and physical or mental well-being of persons, in particular, cruel treatment, as a violation of Common Article 3 to the Geneva Conventions and of Additional Protocol II. Without needing to enumerate in full the elements of these offences, I rely upon the well-established jurisprudence of the International Tribunals that evidence of sexual violence may constitute offences of inhumane acts as a crime against humanity,[1] and violence to life, health and physical or mental well-being of persons, in particular, cruel treatment may constitute a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[2]

8. In the *Celebici* Judgement, the Trial Chamber of the ICTY held one accused criminally responsible as a superior for cruel treatment as a violation of Article 3 of the Statute, for acts of sexual violence committed by his subordinates, that involved tying a burning fuse cord around the genitals of a male victim.[3] The same accused was also convicted of inhuman treatment and cruel treatment as violations of Articles 2 and 3 of the Statute, when his subordinates forced two brothers to publicly perform fellatio on each other.[4] The Chamber held in this respect that:

> Accordingly, on the basis of the foregoing evidence, the Trial Chamber finds that, on one occasion, Esad Landzo ordered Vaso Dordic and his brother, Veseljko Dordic, to remove their trousers in front of the other detainees in Hangar 6. He then forced first one brother and then the other to kneel down and take the other one's penis into his mouth for a period of about two to three minutes. This act of fellatio was performed in full view of the other detainees in the Hangar.
>
> The Trial Chamber finds that the act of forcing Vaso Dordic and Veseljko Dordic to perform fellatio on one another constituted, at least, a fundamental attack on their human dignity. Accordingly, the Trial Chamber finds that this act constitutes the offence of inhumane treatment under Article 2 of the Statute, and cruel treatment under Article 3 of the Statute. The Trial Chamber notes that the

[1] *Prosecutor v. Akayesu*, Trial Judgment, 2 September 1998, paras 688, 697.
[2] *Prosectutor v. Akayesu*, Trial Judgment, 2 September 1998, paras 706-707, 731-734, 688; *Prosecutor v. Kayishema and Ruzindana*, Trial Judgment, para. 108; *Prosecutor v. Musema*, Trial Judgment, para. 156; *Prosecutor v. Celebici*, Trial Judgment, paras 551-52.
[3] *Prosecutor v. Celebici*, Trial Judgment, paras 1038-40.
[4] *Id*, para. 1066

aforementioned act could constitute rape for which liability could have been found if pleaded in the appropriate manner.[5]

9. In the case of *Akayesu*, the Trial Chamber of the ICTR recognised forced nudity as a form of sexual violence that constitute inhumane acts as crimes against humanity. The Chamber stated:

> [T]he Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity", set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.[6]

10. Before moving to determine the issue of the admissibility of evidence of sexual violence at trial, it is necessary to consider whether Counts 3 and 4 of the Consolidated Indictment are plead with sufficient particularity to put the Accused on notice of the material facts that are alleged by the Prosecution to include acts of sexual violence. In my opinion, it is important to draw a distinction between the material facts which must be plead in an indictment, and the evidence by which those material facts will be proved, which is provided by way of pre-trial discovery and need not be plead, together with the evidence that will be elicited by witnesses at trial.[7]

11. Notably, the exercise of deciding on the admissibility of evidence is ongoing throughout the trial. The Prosecution must establish the relevance and probative value of the evidence that it seeks to bring forward. A Trial Chamber will, if necessary, intervene *ex officio* to exclude from the proceedings evidence that for one or more of the reasons laid out in the rules, ought not to be admitted into evidence. This would be more particularly so if the admission of such evidences were to unfairly prejudice an accused and hence violate his fundamental rights.

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[5] *Id*, paras. 1065-66.
[6] *Akayesu* Trial Judgment, para. 688.
[7] *Blaskic* Appeals Judgment, para. 210.

12. Viewed from that perspective, the issue currently before the Chamber and which must be disposed of first, however, is whether these offences have been plead with requisite specificity to put the Accused on notice. I turn now to address this issue.

General Principles of Pleading

13. In accordance with Rule 47(c) of the Rules, an Indictment, as the primary accusatory instrument, shall contain *inter alia*, a statement of the offences for which the Accused is charged, together with a short description of the particulars of the offence. Rule 47(c) of the Rules provides that:

> The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

14. This obligation for the Prosecution to set out the particulars of the offences charged must be interpreted in conjunction with Articles 17(2) and (4)(a) and (b) of the Statute and Rule 26*bis* of the Rules. These provisions state that, in the determination of any charges against the Accused, he is entitled to a fair hearing and to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.

15. This Trial Chamber has in previous decisions espoused the principles for the pleading of indictments. In the case of *Sesay*[8] the Trial Chamber deduced seven specific principles governing the framing of Indictments and reasoned that:

> Based generally on the evolving jurisprudence of sister international tribunals, and having particular regard to the object and purpose of Rule 47(C) of the Special Court Rules of Procedure and Evidence which, *in its plain and ordinary meaning*, does not require an unduly burdensome or exacting degree of specificity in pleading an indictment, but is logically consistent with the foregoing propositions of law, the Chamber considers it necessary to state that in framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of

[8] *Prosecutor v. Issa Hassan Sesay*, 13 October, 2003, para. 5.

> the events and the filing of the indictment, (vii) the totality of the circumstances surrounding the commission of the alleged crimes.[9]

16. The Trial Chamber adapted these principles to the unique features and circumstances of the Special Court and further stated that:

> "In this regard, it must be emphasized that where the allegations relate to ordinary or conventional crimes within the setting of domestic or national criminality, the degree of specificity required for pleading the indictment may be much greater than it would be where the allegations relate to unconventional or extraordinary crimes for example, mass killings, mass rapes and wanton and widespread destruction of property (in the context of crimes against humanity) and grave violations of international humanitarian law within the setting of international criminality."[10]

17. These principles have been applied subsequently by the Trial Chamber in its decisions in the case of *Kanu*,[11] *Kondewa*[12] and *Norman*.[13] In the *Norman* Decision, the Chamber considered that "the materiality of the facts to be pleaded depend on the nature of the Prosecution case and the alleged proximity of the Accused to those events".[14]

18. A distinction has been drawn in the jurisprudence of the International Tribunals between the level of specificity required when pleading the individual responsibility of an Accused under Article 6(1) of the Statute and the superior responsibility of the Accused under Article 7(3) of the Statute. A further distinction is made between individual responsibility where it is not alleged that the Accused personally carried out the acts underlying the offences charged and individual responsibility where it is alleged that the Accused personally carried out the acts in question.[15] In the *Norman* case, the Chamber considered that the material facts to be pleaded in an indictment will depend on the particular form of criminal participation of the Accused. The Chamber considered the level of specificity required when pleading superior responsibility and cited the reasoning of the Trial Chamber in the *Brdanin* case where the Chamber stated that :

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[9] Id., para 8.
[10] Id., para 9.
[11] *Prosecutor v. Santigie Borbor Kanu*, Decision on the Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November, 2003.
[12] *Prosecutor v. Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 27 November, 2003.
[13] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November, 2004; *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Separate Concurring Opinion of Judge Bankole Thompson on Decision on First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November, 2004.
[14] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November, 2004, para. 24.
[15] *Blaskic* Appeals Judgment, para. 211.

> [W]hat is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them. However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown – and because the acts themselves often cannot be greatly in issue.[16]

19. The question of whether the Consolidated Indictment has been plead with sufficient particularity is therefore dependent on whether it sets forth the material facts of the Prosecution case with enough detail to inform the Accused clearly of the charges so as to prepare a defence.[17]

20. Counts 3 and 4 of the Consolidated Indictment do not specifically plead any acts of sexual violence as constituting the offences of inhumane acts as a crime against humanity, nor violence to life, health and physical or mental well-being of persons, in particular, cruel treatment, as a violation of Common Article 3 to the Geneva Conventions and of Additional Protocol II. Counts 3 and 4 state as follows:

> COUNTS 3-4: PHYSICAL VIOLENCE AND MENTAL SUFFERING
>
> 26. Acts of physical violence and infliction of mental harm or suffering included the following:
>
> a. between about 1 November 1997 and 30 April 1998, at various locations, including Tongo Field, Kenema Town, Blama, Kamboma and the surrounding areas, the CDF, largely Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilians;
> b. between November 1997 and December 1999, in the towns of Tongo Field, Kenema, Bo, Koribundo and surrounding areas, and the Districts of Moyamba and Bonthe, the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians by the actions of the CDF, largely Kamajors, including screening for **"Collaborators"**, unlawful killing of suspected **"Collaborators"**, often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of **"Collaborators"**, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot.
>
> By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:
>
> **Count 3:** Inhumane Acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute;

[16] *Id*, para. 19.
[17] *Kupreskic* Appeal Judgment, para. 88.

In addition, or in the alternative:

Count 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.a. of Statute.

21. Trial Chambers of the International Tribunals have held that the failure to plead material facts and elements of offences in an Indictment render it vague and unspecific, and in many cases defective. In the case of *Simic*, the Accused was charged with the crime of cruel and inhumane treatment as acts of persecution. The Trial Chamber declined to consider any cruel and inhumane treatment falling outside the categories of beatings, forced labour assignments and confinement under inhumane conditions, which were specifically plead in the Indictment. The Chamber considered the wording "cruel and inhumane treatment *including*" too vague and unspecific to have "provided notice to the Defence of the incidents not explicitly set out in the Amended Indictment".[18]

22. The Trial Chamber in the *Kayishema*[19] case considered that the Indictment did not particularise the nature of the acts relied upon by the Prosecution for the charge of "other inhumane acts" as a crime against humanity. The Chamber in that case considered that it was incumbent, therefore, upon the Prosecution "to rectify the vagueness of the counts during the presentation of evidence".[20] The Chamber further considered that the Prosecution failed throughout the trial to adequately particularise the portions of evidence that supported the "other inhumane acts" charges. The Chamber concluded that "[t]his method of using the crime as a 'catch-all' – specifying which acts support the count almost as a postscript – does not enable the counts of other inhumane acts to transcend from vagueness to reasonable precision". The Chamber held that the Defence Teams were not "properly seized of the acts that allegedly constituted the inhumane acts charges until the end of the trial".[21]

23. In circumstances where an Indictment is vague and unspecific, Chambers of the International Tribunals have considered it necessary to inquire further as to whether such vagueness is rectified through the presentation of evidence at trial or through other means of notice from the Prosecution to the Accused.

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[18] *Simic* Trial Judgment, para. 73.
[19] *Kayishema* Trial Judgment, 21 May 1999.
[20] *Id*, para. 584.
[21] *Id*, para. 587.

24. The Appeals Chamber of the ICTY in the *Kvocka* case found after a careful review of the trial record, that the Prosecution "gave timely, clear, and consistent information to the Appellants, which detailed the factual basis of the charges against them and thereby compensated for the Indictment's failure to give proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility".[22] In this case the Appeals Chamber considered that the Indictment was defective as it failed to make any specific mention of joint criminal enterprise. The Chamber noted, however, that the Prosecution Pre-Trial Brief had addressed the "common purpose responsibility" in some detail, as had the opening statement of the Prosecution,[23] were sufficient to give adequate notice to the Accused of the charges against him.

Notice of Charges Against Accused

25. I will turn now to consider, in line with the above authorities, whether the Prosecution gave timely and clear notice of the charges of sexual violence against the Accused, to compensate for lack of specificity in the Indictment, hence the failure to provide in the Indictment sufficient notice. More specifically, upon review of the Supplemental Pre-Trial Brief[24] filed by the Prosecution on the 22nd of April, 2004, with respect to Counts 3 and 4 of the Consolidated Indictment, I note that it represents that the evidence from witnesses on the Bonthe District will testify to acts of sexual violence. On this subject the Supplemental Pre-Trial Brief states that:

> [...]
>
> women and girls were subjected by the CDF to sexual assaults, harassment, and non-consensual sex, which resulted in the widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering.
>
> [...]
>
> It is the prosecution theory of the case that the planning, instigation, ordering or committing of unlawful physical violence and mental harm or suffering through sexual assaults as well as other acts during the attacks in Bonthe District, or the aiding and abetting thereof, or that resulted from the common plan to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone, can be reasonably inferred from, *inter alia*:

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[22] *Kvocka* Appeals Judgment, para. 43.
[23] *Id*, paras 36-54.
[24] Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004, 22 April 2004.

a. the fact that the CDF command and control center was located in Talia, Bonthe District for a period of time and served as the residence of Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa for a portion of that time.
b. the overall conduct of the CDF, not limited to any one district, which engaged in the widespread infliction of physical violence and mental harm or suffering as part of a campaign of terror and collective punishment.[25]

26. I also note that the Opening Statement of the Prosecutor David Crane on the first day of trial on the 3rd of June, 2004, made reference to acts of sexual violence as acts charged against the Accused. The Prosecutor stated:

> At Tihun, one of the Kamajors wanted to be his wife - wanted her to be his wife, but she refused and, in reward, she was threatened with death. The Kamajor had her perform conjugal duties and that witness was held in sexual slavery for a whole year. The witness was unable to escape because at every point in time there was a Kamajor that stood guard to prevent her from doing so. It was at Talia the witness met her mother in captivity and it was also the same place that she met the third Accused, Allieu Kondewa, who took her into his bedroom and raped her many times into the night. That witness will be here to testify to that.[26]

27. Referring to another witness who would testify, the Prosecutor stated:

> She will testify that she was raped by one Kamajor, who then forcefully took her as a wife. She spent three months at Talia with the Kamajors and during her captivity she witnessed a lot of killings of innocent civilians who were brought into town by these Kamajors.

28. The Prosecutor also referred to witnesses who would testify that:

> The witnesses also testify that some girls and women were brought to Base Zero and they were forced to have sex and they were raped and they were held in sexual slavery and subjected to systematic sexual violence with Kamajor commanders like Kamoh Lahai and King Kondewa himself. This Court will hear testimonies of looting, raping and terrorising of civilians committed by this dreadful death squad.

29. Based upon the foregoing I am of the view that the Prosecution have provided the Accused with adequate notice that evidence about acts of sexual violence would be elicited at trial in support of Counts 3 and 4 of the Consolidated Indictment, through the means of the Supplementary Pre-Trial Brief, the Opening Statement, pre-trial disclosure of witness statements containing testimony on sexual violence, together with the further notice of intention through this Motion for clarification. In view of this notice, I do not believe that the failure to explicitly list acts of sexual violence in the Consolidated Indictment would materially impair the ability of any of the Accused to effectively prepare his defence on such allegations. The Accused have been on notice since before the start of trial that evidence of sexual violence would be elicited at trial as relevant and probative evidence to establish the allegations set forth in Counts 3 and 4 of the Consolidated Indictment.

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[25] See paragraphs 91(b), 92, 220(b), 221 and 35(b) of the Indictment with respect to the three Accused.

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30. I further consider that no undue delay will be caused, or would have been caused, by the Prosecution calling witnesses to testify on evidence relating to sexual violence. As set forth by the Appeals Chamber of the ICTR in the case of *Mugiraneza*,[27] the factors necessary to consider when determining whether there has been a violation of the Accused's right to be tried without undue delay include, *inter alia*:

(1) The length of the delay;
(2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
(3) The conduct of the parties;
(4) The conduct of the relevant authorities; and
(5) The prejudice to the accused, if any.

31. I am of the view that no delay will be occasioned in allowing the adduction of the proposed evidence and, therefore, it is unnecessary to consider further whether there may in fact be any *undue* delay.

32. I find that no prejudice will accrue to the Accused. As stated above, the Accused have been on notice of the charges against them, that include acts of sexual violence as constituting inhumane acts as a crime against humanity, and violence to life, health and physical or mental well-being of persons, in particular, cruel treatment, as a violation of Common Article 3 to the Geneva Conventions and of Additional Protocol II.

33. Furthermore, I do not accept the Defence argument that the evidence is more prejudicial than probative, nor that such evidence constitutes inadmissible character evidence. Evidence of acts of sexual violence are no different than evidence of any other act of violence for the purposes of constituting offences within Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible character evidence by virtue of their nature or characterisation as "sexual".

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[26] Trial Transcript, 3 June 2004, page 23.
[27] *Prosecutor v. Mugiraneza*, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004.

34. Contrary to what has been held by the Majority, I consider that the Indictment Decision does not preclude evidence of acts of sexual violence that is relevant and probative to Counts 3 and 4 of the Consolidated Indictment from being elicited at trial and that such evidence should be allowed to be introduced by the Prosecution as part of their case against these Accused.

Done at Freetown this 24th day of May, 2005

Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]